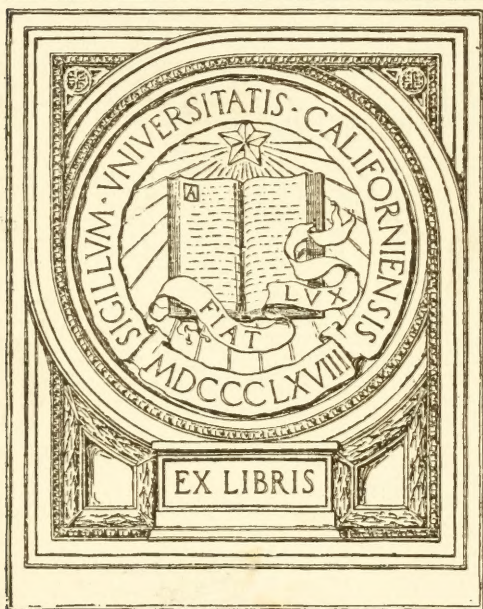


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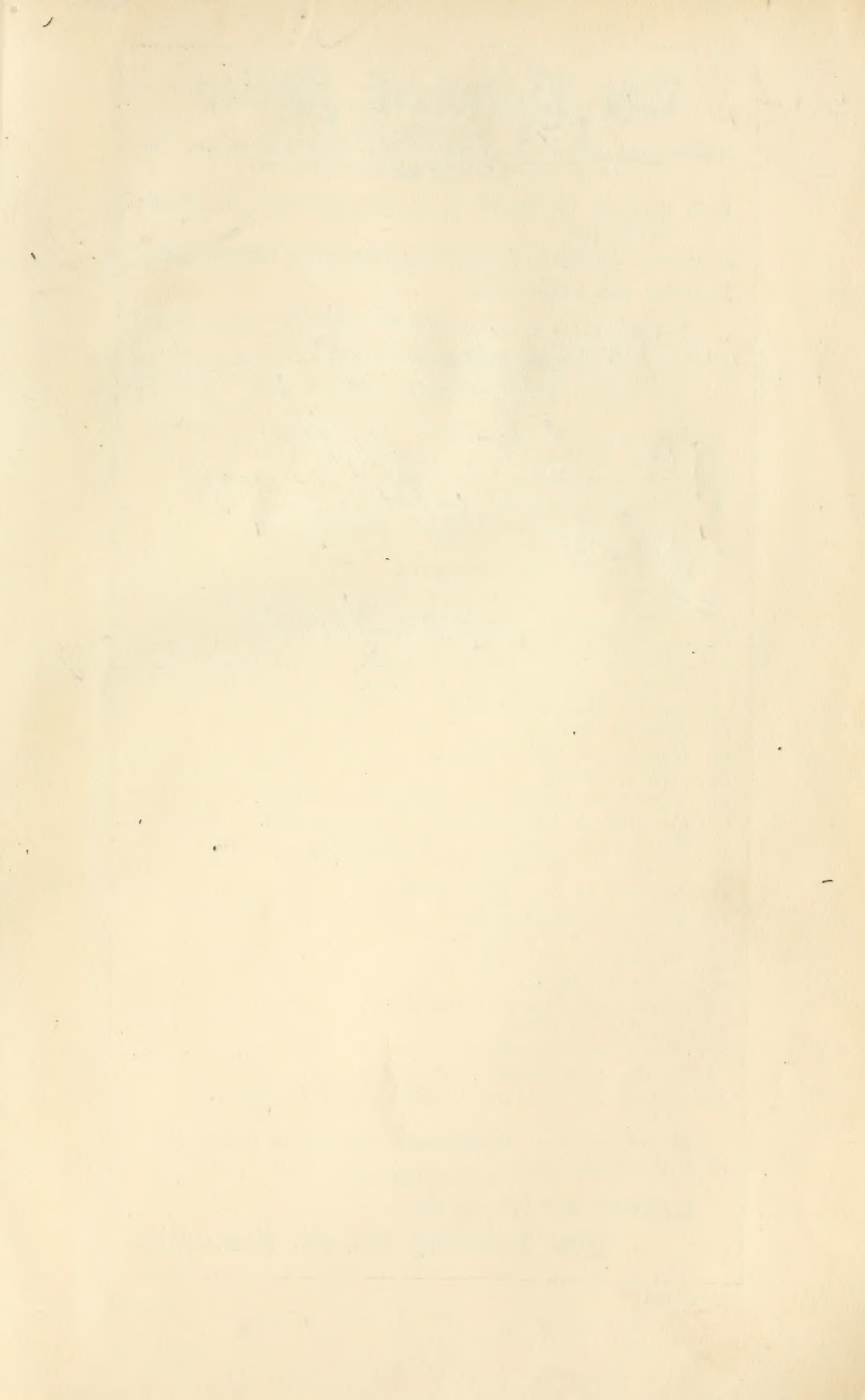


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HANDBOOK
OF THE
LAW OF CONTRACTS

By WM. L. CLARK, Jr.
Author of Clark's Handbook of Criminal Law

SECOND EDITION
By FRANCIS B. TIFFANY

ST. PAUL, MINN.
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PREFACE TO THE SECOND EDITION.

In preparing the present edition the editor has had the benefit of suggestions made by many instructors who have used Mr. Clark's book in the class room. Some new matter has been added, which has led to the condensation of portions of the original text; and some cases formerly cited have been omitted to make room for more recent cases, but the editor has endeavored to retain all leading cases cited by Mr. Clark. The chapters on Agency and Quasi Contracts, although perhaps somewhat beyond the scope of an elementary book on Contracts, have been retained with little change, for the benefit of schools which do not make these topics the subjects of separate courses.

The publishers have adopted the device of printing in bold type the names of cases cited in the notes which are found in certain of the collections of leading cases. The cases so printed are to be found in Hopkins' Cases on Contracts, Langdell & Williston's Cases on Contracts, Williston's Cases on Contracts, Huffcut & Woodruff's American Cases on Contracts, Keener's Cases on Contracts, and Keener's Cases on Quasi Contracts.

F. B. T.

St. Paul, June 3, 1904.

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PREFACE TO THE FIRST EDITION.

In preparing this work the object has been to present the general principles of the law of contract clearly and concisely, with proper explanations and illustrations,—not to make a digest. There has been no attempt to be original for the mere sake of originality. Statements of rules have been freely taken from recognized authorities. So much use has been made of Sir William Anson's and Mr. Leake's works, that acknowledgment has not always been made in the notes. A general acknowledgment is therefore made here. Where matter has been obtained from other sources it has been duly acknowledged.

Nearly 10,000 cases have been cited. Every one of them has been personally examined, and is cited because in point,—not because it has been cited by some other writer, or in some other case, or because it is found in the digests. A few cases have been cited for their valuable dicta, or because they collect and discuss the cases, but in most instances the cited case will be found to embody an actual decision directly in point. Where a number of decisions have been cited to the same point, the leading cases and those best illustrative of the principle involved have been cited first.

W. L. C., Jr.

St. Paul, Minn., November 15, 1894.

TABLE OF CONTENTS.

CHAPTER I.

DEFINITION, NATURE, AND REQUISITES OF CONTRACT IN GENERAL.

Section		Page
1-2.	Contract Defined.....	1-2
3.	Agreement	2-4
4.	Obligation	5-6
5.	Concurrence of Agreement and Obligation.....	6-9
6.	Promise	9-10
7-9.	"Void," "Voidable," and "Unenforceable" Agreements.....	10-11
10.	Essentials of Contract.....	12

CHAPTER II.

OFFER AND ACCEPTANCE.

11-13.	In General	13-15
14-15.	Communication by Conduct—Implied Contracts.....	15-18
16.	Communication of Offer.....	18-20
17.	Necessity and Effect of Acceptance.....	21-22
18-20.	Communication of Acceptance.....	22-27
21.	Character, Mode, Place, and Time of Acceptance.....	27-31
22-23.	Revocation of Offer.....	31-36
24.	Lapse of Offer.....	36-38
25.	Offers to the Public Generally.....	38-40
26.	Offer as Referring to Legal Relations.....	40-46

CHAPTER III.

CLASSIFICATION OF CONTRACTS—CONTRACTS UNDER SEAL AND CONTRACTS OF RECORD.

27.	Classification of Contracts.....	47-49
28.	Contracts of Record.....	49-50
29.	Contracts under Seal	51
30-32.	How Contracts under Seal are Made.....	51-57
33.	Characteristics of Contract under Seal.....	57-60
34.	Necessity for Contract under Seal.....	61

CHAPTER IV.

CONTRACTS REQUIRED TO BE IN WRITING—STATUTE OF FRAUDS.

Section		Page
35-36.	In General of Requirement of Writing.....	62-64
37.	Statute of Frauds—In General.....	64-65
38.	Contracts within Section 4.....	65-66
39.	Promise by Executor or Administrator.....	66
40.	Promise to Answer for Debt, Default, or Miscarriage of Another.....	66-72
41.	Agreement in Consideration of Marriage.....	72-73
42.	Contract or Sale of Lands.....	73-77
43.	Agreement not to be Performed within one Year...	77-82
44-49.	Form Required.....	82-91
50-51.	Effect of Noncompliance	91-97
52-54.	Contracts within Section 17.....	97-98
55.	What are goods, wares, and merchandises.....	98-101
56.	Acceptance and Receipt.....	101-103
57-58.	Earnest and Part Payment.....	104
59.	Form Required.....	104-105
60.	Effect of Noncompliance.....	105

CHAPTER V.

CONSIDERATION.

61-62.	Consideration Defined.....	106-109
63-64.	Necessity for Consideration, and Presumption.....	110-112
65-66.	Adequacy of Consideration.....	112-116
67.	Sufficiency or Reality of Consideration.....	116-117
68-70.	Mutual Promises—Mutuality.....	117-121
71-73.	Forbearance to Exercise a Right.....	121-125
74-76.	Doing What One is Bound to Do.....	126-133
77-78.	Impossible and Vague Promises.....	134-135
79.	Legality of Consideration.....	136
80.	Consideration in Respect of Time—Past Consideration.....	136-142

CHAPTER VI.

CAPACITY OF PARTIES.

81.	In General.....	143-144
82-83.	Political Status—States and United States.....	144-145
84.	Foreign States and Sovereigns.....	146
85-88.	Aliens	146-148
89.	Convicts	148-149
90.	Professional Status.....	149
91-94.	Infants—In General.....	149-154
95-97.	Liability for Necessaries.....	155-160

Section		Page
98.	Ratification and Avoidance.....	160-162
99-101.	Who may Avoid Contract.....	162-163
102-104.	Time of Avoidance.....	164-166
105-107.	What Amounts to Ratification.....	166-169
108.	What Amounts to Disaffirmance.....	170
109.	Extent of Ratification or Disaffirmance.....	171
110-111.	Return of Consideration	171-174
112-114.	Effect of Ratification and Disaffirmance.....	175-176
115-116.	Torts in Connection with Contracts.....	176-178
117.	Insane Persons—In General.....	178-184
118-121.	Ratification and Avoidance.....	184-186
122-123.	Drunken Persons.....	186-188
124.	Married Women.....	188-191
125-128.	Corporations	191-194

CHAPTER VII.

REALITY OF CONSENT.

129.	In General.....	195-196
130-131.	Mistake	196-207
132-134.	Effect—Remedies	207-208
135.	Misrepresentation	208
136-138.	Effect	209-219
139.	Fraud.	220-234
140-141.	Effect—Remedies	234-239
142-144.	Duress	240-246
145-146.	Undue Influence.....	246-253

CHAPTER VIII.

LEGALITY OF OBJECT.

147.	In General	254-255
148.	Classification of Unlawful Agreements.....	255
149.	Agreements in Violation of Positive Law.....	255-256
150.	Breach of Rules of Common Law.....	256-259
151.	Breach of Statute—Constitutional Law.....	259-260
152.	Prohibition by Statute.....	260-263
153.	Particular Agreements in Breach of Statute.....	263-281
154-155.	Agreements Contrary to Public Policy.....	281
156.	Agreements Tending to Injure the Public Service.....	282-290
157.	Nonofficial Corruption.....	290-291
158-160.	Perversion or Obstruction of Justice.....	292-296
161.	Encouragement of Litigation—Champerty and Maintenance	296-300
162.	Agreements of Immoral Tendency.....	300-301
163.	Agreements Tending to Fraud and Breach of Trust....	301-302
164.	Agreements in Derogation of the Marriage Relation....	302-304
165.	Agreements in Derogation of Parental Relation.....	305
166-169.	Agreements in Restraint of Trade.....	305-312

Section		Page
170-172.	Unlawful Combinations—Monopolies, Trusts, etc.....	312-318
173-175.	Exempting from Liability for Negligence.....	318-321
176.	Effect of Illegality—Agreements Partly Illegal.....	321-325
177-178.	Object Unlawful but Intention Innocent.....	325-326
179-181.	Object Innocent but Intention Unlawful.....	327-332
182.	Promises to Pay Money Due on Illegal Transactions....	332-335
183-185.	Relief of Party to Unlawful Agreement.....	336-342
186.	Conflict of Laws—In Space.....	342-346
187.	In Time	342-346

CHAPTER IX.

OPERATION OF CONTRACT.

188.	Limits of Contractual Relation—In General.....	347-349
189-190.	Imposing Liability on Third Persons.....	349-350
191-192.	Conferring Rights on Third Persons.....	351-359
193.	Assignment of Contracts—In General.....	359
194.	Assignment of Liabilities by Act of Parties.....	360-361
195-197.	Assignment of Rights by Act of Parties.....	361-372
198.	Assignment by Operation of Law.....	372
199.	On Transfer of Interests in Land.....	372-376
200.	On Marriage.....	377
201.	On Death.....	377-378
202.	Joint and Several Contracts—In General.....	379
203-204.	Joint Contracts.....	379-382
205-206.	Several Contracts.....	383
207.	Contracts both Joint and Several.....	384
208.	Contribution between Joint Debtors.....	384-385

CHAPTER X.

INTERPRETATION OF CONTRACT.

209-213.	Rules Relating to Evidence—In General—Parol Evidence..	386-388
214-215.	Proof of Document.....	388-390
216.	Evidence as to Fact of Agreement.....	390-392
217.	Evidence as to Terms of Contract.....	392-401
218-219.	Rules of Construction—General Rules.....	402-408
220.	Rules as to Time.....	408-410
221-222.	Rules as to Penalties and Liquidated Damages.....	411-414
223.	Joint and Several Contracts.....	415-416

CHAPTER XI.

DISCHARGE OF CONTRACT.

224.	In General.....	417
225-226.	By Agreement—In General.....	418
227-228.	Waiver, Cancellation, or Rescission.....	418-419
229-230.	Substituted Contract.....	420-424

Section		Page
231.	Form of Discharge by New Agreement.....	424-427
232.	Conditions Subsequent.....	427-430
233.	By Performance—In General.....	430-434
234.	Payment	434-439
235.	Tender	440-442
236-237.	By Breach—In General.....	443
238.	Forms of Discharge by Breach.....	443
239-240.	Renunciation of Contract.....	444-447
241.	Impossibility Created by Party.....	448-449
242.	Breach by Failure of Performance.....	449-450
243-244.	Independent Promises.....	450-458
245-249.	Conditional Promises.....	458-471
250.	By Impossibility of Performance.....	472-477
251.	By Operation of Law.....	478
252.	Merger	478-479
253.	Alteration of Written Instrument.....	479-484
254.	Proceedings in Bankruptcy.....	484
255.	Remedies on Breach of Contract.....	484-485
256-259.	Damages	485-488
260.	Specific Performance.....	489-491
261.	Discharge of Right of Action.....	491
262.	By the Consent of the Parties.....	491-493
263.	By Judgment.....	493-494
264-265.	By Lapse of Time.....	495-496

CHAPTER XII.

AGENCY.

266.	Creation of the Relation—Capacity of Parties.....	497
267.	How the Relation may Arise.....	498-499
268-269.	Form of Authority.....	500-502
270.	Agency by Estoppel.....	500-502
271.	Ratification	502-507
272-273.	Effect of Relation—Rights and Liabilities of Principal and Agent inter Se	507-512
274.	Rights and Liabilities as to Third Persons—Named Principal	512-519
275.	Name of Principal Undisclosed.....	519-521
276.	Existence of Principal Undisclosed.....	521-523
277.	Fraud of Agent.....	523-524
278.	Determination of the Relation.....	524-529

CHAPTER XIII.

QUASI CONTRACT.

279.	In General.....	530-533
280.	Money Paid for the Use of Another.....	533-536
281.	Money Received for the Use of Another.....	536-547
282.	Recovery for Benefits Conferred.....	547-553

Rev. 1-262

HANDBOOK

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SECOND EDITION.

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DEFINITION, NATURE, AND REQUISITES OF CONTRACT IN GENERAL.

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5. Concurrence of Agreement and Obligation.
6. Promise.
- 7-9. "Void," "Voidable," and "Unenforceable" Agreements.
10. Essentials of Contract.

CONTRACT DEFINED—BROADEST SENSE.

1. A contract, in its broadest sense, is an agreement whereby one or more of the parties acquires a right, in rem or in personam, in relation to some person, thing, act, or forbearance. It may be, in its inception:
 - (a) Executory; that is, where an obligation is assumed by one or both parties to do or forbear from doing some act. The rights acquired are rights in personam.
 - (b) Executed; that is, where everything is done at the time of agreement, and no obligation is assumed, as in the case of a conveyance of land without covenants, or a sale and immediate delivery of goods for cash and without warranty.* Executory contracts when fully performed are also said to be executed.

* The propriety of calling such an agreement a contract has been questioned. Post, p. 7, note 12.

SAME—PROPER SENSE.

- 2. A contract in its narrower, and more proper, sense is an executory contract. It is the result of the concurrence of agreement and obligation, and may be defined as an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.¹**

When we speak of contracts we generally mean executory contracts, and it is of this kind of contract principally that this work is to treat. A contract in this sense results from the combination of the two ideas of "agreement" and "obligation." It is that form of agreement, or meeting of minds, which directly contemplates and creates an obligation; and the contractual obligation is that form of obligation which springs directly from agreement. It is necessary, therefore, to understand clearly what is meant by the terms "agreement" and "obligation," and how they may or may not concur so as to create a contract.

AGREEMENT.

- 3. Agreement is the expression by two or more persons, either by words or by conduct, of a common intention to affect the legal relations of those persons.² There must be a meeting of two minds in one and the same intention.**

From the very nature of agreement the first essential is the consent of the parties. There must be a meeting of two minds in one and the

¹ The following are some of the definitions given in the books:

"An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." Anson, *Cont.* (8th Ed.) 9.

"Every agreement and promise enforceable by law is a contract." Pol. *Cont.* 1.

"An agreement, upon sufficient consideration, to do or not to do a particular thing." Bl. *Comm.* 442; 2 Kent, *Comm.* 449.

"An agreement between two or more parties for the doing or the not doing of some particular thing." 1 Pars. *Cont.* 6.

"A contract or agreement not under seal may be defined to be an engagement entered into between two or more persons, whereby, in consideration of something done or to be done by the party or parties on one side, the party or parties on the other promise to do or omit to do some act." Chit. *Cont.* 7.

"A contract is a promise from one or more persons to another or others, either made in fact or created by law, to do or refrain from some lawful thing; being also under the seal of the promisor, or being reduced to a judicial record, or being accompanied by a valid consideration, or being executed, and not being in a form forbidden or declared inadequate by law." Bish. *Cont.* § 22.

² See Anson, *Cont.* (4th Ed.) 3. "(1) An agreement is an act in the law,

same intention. In the absence of this element there can be no agreement, and, therefore, no contract.

Two Parties Necessary.

It is manifest that at least two parties are necessary. There may be more than two, but there cannot be less. It is therefore impossible for a man to make an agreement or contract with himself.³

Distinct Common Intention.

It is also essential that there be a distinct intention, and an intention which is common to both parties. If there is doubt or difference, there is no meeting of minds, and hence no agreement. If a person, when asked whether he will do a certain thing, says, "Very possibly," there is doubt, and no agreement is reached; and if he says he will do something else, there is a difference, and therefore no agreement.

Communication of Intention.

Agreement further imports that there shall be a mutual communication between the parties of their intentions to agree, for without this neither could know the state of the other's mind. The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. Mere uncommunicated intention, though common to both parties, cannot constitute agreement. If a person asks another if he will do something, and the latter makes no reply, there is no agreement, even though he may intend to do it. A secret acceptance of a proposal cannot constitute agreement; nor, it is said, can agreement result where the intention of a party is communicated, not to the other party, but to a third person.⁴ As we shall see, communication may be by conduct as well as by words.

whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them. (2) Such declaration may consist of (a) the concurrence of the parties in a spoken or written form of words as expressing their common intention, or (b) a proposal made by some or one of them, and accepted by the others or other of them." Pol. Cont. 1.

³ Another reason why a man cannot enter into a contract with himself is because he cannot be under a legal obligation to himself. Post, p. 5.

⁴ Leake, Cont. 8. Intention may be communicated to the agent of a party, but this is equivalent to communication to the party himself. "In the case in hand," it was said, "the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which in itself is no indication of an acceptance become such because accompanied by an unevinced mental determination." WHITE v. CORLIES, 46 N. Y. 467.

Reference to Legal Relations.

An agreement, to be recognized as such by the law, so as to constitute a contract, must be "an act in the law;" ⁵ that is, it must be, on the face of the matter, capable of having legal effects; and therefore, the intention of the parties must refer to legal relations, so that the courts, which can only deal with legal relations, may take cognizance of it. It must have reference to the assumption of legal rights and duties, as opposed to engagements of a social character and engagements of honor. If a person agrees to sell another a horse, the agreement refers to legal relations, and may result in contract; but, if a person agrees to go to another's house to dine, the intention refers merely to a social engagement, and no contract results. Legal consequences are not contemplated.⁶

Consequences must Affect the Parties.

In order that agreement may result in obligation, so as to constitute contract, the consequences of the agreement must affect the parties themselves; otherwise the verdict of a jury, which is an agreement between the jurors, would satisfy the requirements.⁷

⁵ Pol. Cont. 2.

⁶ It has been said that we may accept as a test of this question that the intention must relate to something which is of some value in the eye of the law, something which can be assessed at a money value. Anson, Cont. 2. It is true that the matter of an agreement must be reducible to a money value, to be enforceable; but this necessity does not spring from the nature of agreement. See post, p. 6. Furthermore, there may be agreements which will meet this requirement, and yet will not result in contract, because of the intention of the parties; that is to say, because of failure to refer to legal relations. A man who invites another to dine with him, or perform any other social function, goes to expense in making preparations, and if the engagement is broken, there is a loss which may be assessed at a money value, but this does not make the agreement a contract. The reason is that the parties do not contemplate legal relations and consequences. The engagement is merely a social one. The fact that the matter contemplated is reducible to a money value does not make the agreement a contract, unless, in addition to this, the parties intend to affect their legal relations. Pol. Cont. 2, note (a). See *Earle v. Angell*, 157 Mass. 294, 32 N. E. 164.

⁷ If a fund is held by the trustees under a will, to be paid over to the testator's daughter on her marriage with their consent, and they give their consent to her marrying J. S., this declaration of consent affects the duties of the trustees themselves, for it is one of the elements determining their duty to pay over the fund. Still it is not an agreement, for it concerns no duty to be performed by any one of the trustees towards any other of them. There is a common duty to the beneficiary, but no mutual obligation." Pol. Cont. 3.

OBLIGATION.

4. Obligation is a control exercisable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value.⁸

Obligation is a legal bond or tie whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group. Since there can be no contract without obligation, every element essential to the creation of an obligation is essential to the creation of a contract.

Two Parties Necessary.

From the very nature of things, two persons are necessary. There may be more than two, but there cannot be less. A man cannot be under a legal obligation to himself, or even to himself in conjunction with others. In an English case, where a man had borrowed money from a fund in which he and others were jointly interested, and covenanted to repay the money to the joint account, it was held that he could not be sued upon his covenant. "The covenant, to my mind, is senseless," said Pollock, C. B. "I do not know what is meant, in point of law, by a man paying himself."⁹ And in a Massachusetts case it was said that "it is a first principle that, in whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself. He can in no form be both obligor and obligee."¹⁰

The Parties Must be Definite.

The parties to an obligation must be definite, both those having the right to exercise control and those bound. A man cannot be under an obligation to the entire community. His liabilities to the political society of which he is a member are matters of public or criminal law. Nor can the whole community be under an obligation to him. The correlative right on his part would be a right in rem, and would constitute property, as opposed to obligation. Whether the right is to personal freedom or security, to character, or to those more material objects which we commonly call property, it imposes a corresponding duty on all to forbear from molesting the right. Such a right is a right in rem. It is of the essence of obligation that the liabilities im-

⁸ Anson, Cont. (4th Ed.) 7. "By 'obligation' we mean the relation that exists between two persons, of whom one has a private and peculiar right (that is, not a merely public or official right, or a right incident to ownership or a permanent family relation) to control the other's actions by calling upon him to do or forbear some particular thing." Pol. Cont. 3.

⁹ Faulkner v. Lowe, 2 Exch. 595.

¹⁰ Eastman v. Wright, 6 Pick. (Mass.) 316. And see Allin v. Shadburne's Ex'r, 1 Dana (Ky.) 68, 25 Am. Dec. 121.

posed are imposed on definite persons, and are themselves definite. The rights which it creates are rights in personam.¹¹ There are apparent exceptions to this rule in the case of contracts made by and with cities and other municipal corporations and with the state. The state represents the public, and such is also the case with municipal corporations, but this fact does not prevent contracts with them. A municipal corporation or the state is a definite party, distinct from the members of the community.

The Rights and Liabilities Must be Definite.

To constitute an obligation enforceable in law, the rights and liabilities given and imposed must be definite. In other words, it must relate to definite acts and forbearances. The freedom of the person bound by an obligation is not curtailed generally, but is limited in reference to some particular act or series or class of acts. If the thing to be done or forborne is so indefinite or uncertain that the court cannot say what was agreed upon, it cannot enforce the agreement. An agreement not enforceable creates no obligation, and therefore cannot result in contract.

The Thing to be Done or Forborne must be Reducible to a Money Value.

The matter of the obligation—that is, the thing to be done or forborne—must possess, or must be reducible to, a pecuniary value. It must have some ascertainable value, in order to distinguish legal from moral and social relations. Gratitude for a past kindness cannot be measured by any standard of value, nor can annoyance and disappointment, caused by the breach of a social engagement. Courts of law can only deal with matters to which the parties have attached an importance estimable by a standard of value of which the courts may take cognizance.

CONCURRENCE OF AGREEMENT AND OBLIGATION.

- 5. An agreement resulting in contract is that form of agreement which directly contemplates and creates an obligation; and the contractual obligation is that form of obligation which springs directly from agreement.**

Agreement Broader Term than Contract.

“Agreement” is a broader term than “contract,” and includes acts in the law of two kinds besides those which we ordinarily term contracts:

- (1) An agreement, for instance, may not create an obligation, and therefore, in reason, may not result in a contract, because its effect is

¹¹ Anson, Cont. (4th Ed.) 5.

concluded as soon as the parties have expressed their common assent. Such are conveyances of land without covenants, gifts, and sales of chattels for cash, with immediate delivery, and without warranty. The agreement of the parties effects at once a transfer of rights in rem, and leaves no obligation subsisting between them. Such agreements are called "executed contracts," but they create no outstanding contractual obligation, and it is at least questionable whether they can properly be termed contracts.¹² It is otherwise if the conveyance is with covenants annexed, or if the sale is on future delivery, or on credit, or with a warranty.

(2) Again, an agreement may create obligations only incidentally or remotely, and therefore not constitute a contract; the essence of contract being in the fact that the direct purpose of the agreement is to create an obligation. Such agreements have the characteristic just alluded to of effecting their main object immediately upon the expression of the intention of the parties, but they differ from simple conveyances and gifts, not only in creating outstanding obligations between the parties, but sometimes in providing for the coming into existence of other obligations, and those not between the original parties to the agreement. Marriage, for instance, sometimes erroneously called a contract, effects a change of status from the moment the consent of the parties is expressed before a competent authority. At the same time it creates obligations between the parties which are incidental to the transaction, and to the immediate objects of the expression of consent or agreement. So, also, a settlement of property in trust for persons unborn effects much more than the mere conveyance of a legal estate to the trustee. It imposes on him incidental obligations, some of which may not come into existence for a long time. It creates possibilities of obligation between him and persons who are not yet in existence. These obligations are the result of agreement, but they are not contract.¹³

¹² There is the highest authority for speaking of conveyances of land without covenants, gifts, and sales of goods for cash, with immediate delivery, and without warranty, as executed contracts. 2 Bl. Comm. 443; 1 Story, Cont. (4th Ed.) § 22; FLETCHER v. PECK, 6 Cranch, 87, 3 L. Ed. 162. The propriety, however, of calling such agreements contracts has, with reason, been questioned. Anson, Cont. 3. It is of the essence of contract, as a legal conception, that it shall contemplate and create a right in personam; that it shall impose an obligation on one of the parties to do or forbear from doing some act. An agreement by which a person binds himself to convey land would therefore be a contract; but how can a conveyance be called a contract? It creates no obligation, but, at the very moment the parties agree, the agreement is carried out. To the effect that an executed gift is not a contract, see Wheeler v. Glasgow, 97 Ala. 700, 11 South. 758.

¹³ Anson, Cont. (4th Ed.) 3; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Ditson v. Ditson, 4 R. I. 87; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654; Watkins v. Watkins, 135 Mass. 83.

*Sources of Obligation*¹⁴—*Directly from Agreement.*

Obligation may arise directly from agreement. Here we find that form of agreement which constitutes contract. An offer is made by one person and accepted by another, so that one consents to intend, and the other to expect, the same thing; and the result of this agreement is a legal tie, binding the parties to one another in respect to some future act or forbearance.

Same—Delict or Tort.

Obligation may arise from delict or tort. This occurs where a primary right to forbearance has been violated; where, for instance, a right to property, to security, or to character has been violated by trespass, assault, or defamation. The wrongdoer is bound to pay to the injured party whatever damages he has sustained. Such an obligation is not created by the free will of the parties, or by agreement, but springs up immediately upon the occurrence of the wrongful act. The person injured has a cause of action which is said to arise *ex delicto*, as distinguished from such as arise *ex contractu*.¹⁵

Same—Breach of Contract.

Obligation may arise from breach of contract. While one person is under promise to another, the promisee has a right against the promisor to performance of the promise when performance becomes due, and to the maintenance up to that time of the contractual relation. But, if the promisor breaks his promise, the promisee's right to performance has been violated, and, even if the contract is not discharged, a new obligation springs up,—a right of action for damages, similar to that which arises upon a delict or tort. The cause of action results from the breach of contract, and is said to arise *ex contractu*.

Same—Quasi Contract.

There are certain obligations which arise neither from tort nor from contract, but which are imposed by law without assent of the party bound. These obligations are not contracts, for there is no agreement; but they are clothed with the semblance of contract for the purpose of remedy, and are described by the term quasi contract.¹⁶ Obligation may arise from the judgment of a court of competent jurisdiction ordering something to be done or forborne by one party in respect of another. This kind of obligation is called a "contract of record." It may arise from entry of judgment by consent of the parties, in which event the element of agreement is present; but, on the other hand, it may arise against the will of the party bound thereby, in which case there is no element of agreement, and therefore no true contract. Such an obligation is quasi contractual.¹⁷

¹⁴ Anson, *Cont.* (4th Ed.) 7.¹⁵ Leake, *Cont.* 3.¹⁶ Post, p. 530.¹⁷ Post, p. 49.

Again, a quasi contractual obligation may arise by the acts of the parties. A person pays something which another ought to pay, or receives something which another ought to receive, and the law imposes on him the duty to make good to the other party the advantage to which the other is entitled. The term "implied contract" is frequently applied to obligations of this class. Its use is objectionable, because the same term is frequently applied to contracts in which the agreement of the parties is evidenced by conduct, and which are hence called "implied contracts," in distinction to contracts in which the agreement is evidenced by words, and which are said to be express.¹⁸

Same—Indirectly from Agreement—Marriage—Trusts.

Finally, obligation may spring from agreement, and yet be distinguishable from contract. As explained in speaking of agreement, this is the case with obligations incidental to such acts as marriage and the creation of a trust. Contractual obligations may arise incidentally to an agreement which has for its direct object the transfer of property. In the case of a conveyance of land with covenants annexed, or the sale of a chattel with a warranty, the obligation hangs loosely to the conveyance or sale, and is so easily distinguishable that it may be dealt with as a contract. But in cases of trust or marriage the agreement is far-reaching in its objects, and the obligations incidental to it are either contingent, or at any rate remote from its main purpose or immediate operation. To create an obligation is the one object which the parties have in view when they enter into that form of agreement which is called contract.

PROMISE.

- 6. A promise is the communication by a person of an intention and willingness to be bound to do or to forbear from doing something at the request or for the use of another, when, but not before, that declaration has become binding by its acceptance by the promisee so as to create an obligation.¹⁹ A promissory expression before acceptance is merely an offer of a promise.**

We are in the habit of considering as the essential feature of contract a promise by one or more parties to another or others to do or forbear from doing certain specified acts; and many of the books use the term "promise," rather than "agreement," to define contract. "In an agreement as the source of a legal contract," it is said, "the matter intended and agreed imports that the one party shall be bound to the other in some act or performance, which the latter shall have a legal right to enforce." The signification of an intention to do some act, or observe some particular course of conduct, made by the one party

¹⁸ Post, p. 531.

¹⁹ Anson, Cont. (4th Ed.) 4; Pol. Cont. 1.

to the other, and accepted by him, for the purpose of creating a right to its accomplishment, is called a promise.²⁰

The term "promise" is used to signify a binding promise, as opposed to a mere offer of a promise. A promissory expression amounting to an offer of a promise does not become a promise until it becomes binding by its acceptance by the person to whom it is made. Before it is accepted it is a mere offer of a promise, called in the civil law a "pollicitation."²¹ It must also be noted that it is not every statement of intention that will amount to an offer of a promise which by acceptance will be turned into a promise. An offer differs from a mere statement of intention in that it imports a willingness to be bound to the party to whom it is made. If a persons says to another, "I intend to sell my horse if I can get \$100 for it," there is no offer that can be turned into an agreement, but merely a declaration of intention. There is no declaration of willingness to be bound. If, however, he says, "I will sell you my horse if you will give me \$100 for it," there is an offer, and, if it is accepted, there is a contract, consisting of mutual binding promises to deliver the horse on the one side, and to accept and pay for it on the other.

Looking at contract, then, in the light of a promise, we may say that there are three stages necessary to the making of that sort of agreement which results in a contract: (1) There must be an offer: (2) there must be an acceptance of the offer, resulting in a promise: and (3) the law must attach a binding force to the promise, so as to invest it with the character of an obligation.

The promise results from the agreement of the parties, and necessarily results from every agreement which directly contemplates and creates an obligation. The agreement makes the contract, and the promise is merely a feature of the contract.

VOID, VOIDABLE, AND UNENFORCEABLE AGREEMENTS.

- 7. A void agreement is one that is entirely destitute of legal effect.**
- 8. A voidable contract is one that is capable of being affirmed or rejected at the option of one of the parties, but which is binding on the other.**
- 9. An unenforceable contract is one that is valid, but incapable of being sued upon or proven.**

We have seen, and in dealing with the formation of contract we shall see more in detail, that certain requisites are essential, and, if they are absent, the contract is said to be void. By this it is meant that it has no legal effect whatever. Clearly, in such a case, there is

²⁰ Leake, Cont. 13.

²¹ See post, p. 21.

no contract at all, and it is a misuse of terms to speak of it as such. A transaction or agreement cannot be void and be called a contract, so it is more accurate to say that the transaction or agreement is void.

A voidable contract is not destitute of legal effect, but may be valid and binding. It is a contract that is capable of being affirmed or rejected at the option of one of the parties. It is binding if he chooses to affirm it, and is of no effect if he chooses to reject it. The other party has no say in the matter. Such is the case, as we shall see, with contracts into which one of the parties has induced the other to enter by means of fraud. The latter may repudiate the contract, or, if he sees fit, he may waive the fraud, and hold the former to his bargain.

It will seem, at first thought, that certain agreements said to be void are not so in fact. For instance, as we shall see, an agreement may be void on the ground of mistake, or, in a few cases, because of the infancy of one of the parties; but, if the mistake or infancy is not pleaded in the action to enforce it, the parties will be held bound. Such an agreement, however, is just as void as an agreement to do something which the law forbids. The cause of nullity is latent, but this does not alter the character of the transaction. It is void if the defendant chooses to prove it so.²²

If the defendant in these cases may, at his option, avoid the contract, or let it stand, there would seem to be a certain unreality in the distinction between void and voidable agreements; but this is not so in fact. In case of voidable agreements there is a contract, though it is marked by a flaw; and the party who has the option may affirm it in spite of the flaw. Where, however, an agreement is void, it falls to the ground as soon as its nullity becomes apparent. It is incapable of affirmance. Another distinction is in the fact that in case of voidable contracts innocent third persons, acting in good faith, may acquire rights thereunder, and thereby cut off the right to avoid it; but no such rights can be acquired where the transaction is void.²³

A contract which is unenforceable cannot be set aside at the option of one of the parties to it. The obstacles to its enforcement do not touch the existence of the contract, but only set difficulties in the way of action being brought or proof given. The contract is valid, but because of these obstacles it cannot be enforced. Such is a contract, as we shall see, which fails to comply with some of the provisions of the statute of frauds, requiring writing, and so cannot be proved; or a contract which has become barred by the statute of limitations. The defect in these contracts is not irremediable. In the first it may be remedied by supplying the writing, and in the second by procuring a proper acknowledgment of the barred debt; but it will be noticed that the defect can be remedied only with the concurrence of the party to be made liable.

²² Anson, *Cont.* (4th Ed.) 204.

²³ Post, p. 238.

ESSENTIALS OF CONTRACT.

Having ascertained the particular features of contract as a juristic conception, the next step is to ascertain how contracts are made. A part of the definition of contract being that it is an agreement enforceable at law, it follows that we must analyze the elements of a contract such as the law will hold to be binding between the parties to it.

10. As there must be an agreement directly contemplating and resulting in an obligation, and the agreement must be enforceable in the law, therefore—

- (a) **There must be a distinct communication by the parties to one another of their intention, or an offer and acceptance.**
- (b) **The agreement must possess the marks which the law requires in order that it may affect the legal relations of the parties, and be an act in the law. Therefore—**
 - (1) **It must be in the form required by law.**
 - (2) **There must be a consideration, when required by law.**
- (c) **The parties must be capable in law of making a valid contract.**
- (d) **The consent expressed in offer and acceptance must be genuine.**
- (e) **The objects which the contract proposes to effect must be legal.**

Where all of these elements coexist, a valid contract is the result. If any one of them is absent, the agreement is in some cases merely unenforceable; in some voidable at the option of one of the parties; and in some absolutely void. We shall now take up in turn each of these elements in separate chapters.

*See 1130 of code
part 4 contracts
of contract*

CHAPTER II.

OFFER AND ACCEPTANCE.

- 11-13. In General.
- 14-15. Communication by Conduct—Implied Contracts.
- 16. Communication of Offer.
- 17. Necessity and Effect of Acceptance.
- 18-20. Communication of Acceptance.
- 21. Character, Mode, Place, and Time of Acceptance.
- 22-23. Revocation of Offer.
- 24. Lapse of Offer.
- 25. Offers to the Public Generally.
- 26. Offer as Referring to Legal Relations.

IN GENERAL.

- 11. To constitute a contract, the expression of common intention must generally, if not always, arise from an offer made by one party to another, and an acceptance by the latter, with the result that one or both are bound by a promise.
- 12. The offer may be—
 - (a) Of a promise, or
 - (b) Of an act.
- 13. The acceptance may be—
 - (a) Simple assent; but, this applies to contracts under seal only.
 - (b) Giving of a promise.
 - (c) Doing of an act.

In practical matters, and for the purpose of creating obligations, every expression of a common intention arrived at by two or more parties is ultimately reducible to question and answer, or to offer and acceptance.¹ Thus, if a person agrees to sell an article to another for a certain price, and the latter agrees to buy it, we can trace the process to the moment when the seller says in words or by conduct, "Will you give me so much for the article?" and the buyer replies, "I will;" or when the buyer says, "Will you take so much for the article?" and the seller says, "I will." There is always this question and answer, or

¹ Anson, Cont. (4th Ed.) 11; Leake, Cont. 12; Thruston v. Thornton, 1 Cush. (Mass.) 91. Pollock objects that this analysis does not properly apply to a case in which the consent of the parties is declared in a set form,—as where they both execute a deed or sign a written agreement. Pol. Cont. 4. But he adds that, "notwithstanding the difficulties that arise in making proposal and acceptance necessary parts of the general conception of contract, there is no doubt that in practice they are the normal and most important elements." Id. 8.

offer and acceptance, though in many cases it is not in so many words. A tradesman displaying his goods says in act, though not in words, "Will you buy my goods at my price?" and a customer taking goods with the tradesman's cognizance virtually says, "I will." The proprietor of a public conveyance, by running it in such a way and place as to invite people to use it, virtually says, "Will you pay me the fare if I carry you?" and one who gets into the conveyance to be carried, by his conduct says, "I will," as plainly as if he were to use the words. And so all contracts, or voluntary obligations, may be reduced to question and answer, either in words, or by conduct, or both. The question is the offer; the answer the acceptance of the offer.

Forms of Offer and Acceptance.

(1) A contract may originate in the offer of a promise, and its acceptance by simple assent, but this applies only to contracts under seal, for, as will presently be seen, the law requires a consideration to support a promise not under seal, and mere assent is not enough. Thus, where one person promises another by writing under seal that he will do a certain thing, or pay a certain sum, and the promisee assents to the proposal, both are bound, and there is a contract. Until such assent, there is only an offer. The offer, unlike offers not under seal, is at common law irrevocable, owing to the seal; but until it has been assented to by the person to whom it is made it does not bind him. A person cannot be forced to accept even a benefit.

(2) As already shown, the presence of a public conveyance on the street is a constant offer by its proprietor to carry persons, and when a person steps into the conveyance he accepts the offer, and promises to pay the fare. This is an offer of an act for a promise.

(3) If a person who has lost property offers by advertisement a reward to any person who shall return it, he offers a promise for an act, and when a person returns the property he accepts and performs the act, and the promise becomes binding.

(4) If a person offers another to pay him a certain sum on a future day if the latter will promise to perform certain services for him before that day, or, vice versa, he offers a promise for a promise, and where the person to whom the offer is made accepts it by promising to perform the services or to pay, as the case may be, both parties are bound, the one to do the work and the other to make the payment. This is the offer of a promise for a promise.

Executed and Executory Consideration.

It will be noticed that cases (2) and (3) differ from (4) in an important respect. In (2) and (3) the contract is formed by one party doing all he can be required to do under the contract. The contract is formed by performance on one side, and it is this performance which makes obligatory the promise on the other. The outstanding obligation is

all on one side. In (4) each party is bound to some act or forbearance in the future. There is an outstanding obligation on both sides. Where the benefit, in contemplation of which the promise is made, is done at the same time that the promise acquires a binding force,—where it is the doing of the act that concludes the contract,—then the act so done is called an executed or present consideration for the promise. Where a promise is given for a promise, each forming the consideration for the other, the consideration is said to be executory or future.

COMMUNICATION BY CONDUCT—IMPLIED CONTRACTS.

14. An offer or its acceptance may be made by conduct as well as by words.

15. Where the terms of a contract are shown by the acts of the parties, the contract is said to be implied. It is, however, implied as a matter of fact. There is an agreement in fact, evidenced by acts.

From what has already been said as to the possible forms of offer and acceptance, it will have been seen that conduct may take the place of written or spoken words in the making of contracts.²

If a person asks another to perform a service for him for compensation, the latter may accept the offer simply by performing the service, unless a particular form of acceptance is prescribed in the offer. His acceptance is inferred or implied from his conduct.³

Again, if a person allows another to work for him under such circumstances that no reasonable man would suppose that the latter means to do the work for nothing, he will be liable to pay for it. The doing of the work is an offer; the permission to do it, or acquiescence in its being done, is the acceptance. The offer and acceptance are inferred or implied as a matter of fact from the circumstances.⁴

² *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *Smith v. Ingram*, 90 Ala. 529, 8 South. 144; *Wetmore v. Mell*, 1 Ohio St. 26, 59 Am. Dec. 607; *Sturges v. Robbins*, 7 Mass. 301; *Train v. Gold*, 5 Pick. (Mass.) 384; *New York & N. H. R. Co. v. Pixley*, 19 Barb. (N. Y.) 428. Taking goods; implied promise to pay for them. *Stoudenmire v. Harper*, 81 Ala. 242, 1 South. 857. Sending goods in response to an order is an acceptance of the offer to buy contained in the order. *Crook v. Cowan*, 64 N. C. 743; *Briggs v. Sizer*, 30 N. Y. 652; *Harvey v. Johnston*, 6 C. B. 295. Retention of the order, if explained, is not an acceptance. *Briggs v. Sizer*, 30 N. Y. 652. Taking possession of property in accordance with a letter offering to sell it is an acceptance. *Dent v. Steamship Co.*, 49 N. Y. 390.

³ See *REIF v. PAIGE*, 55 Wis. 503, 13 N. W. 473, 42 Am. Rep. 731; *Coston v. Morris*, 51 Hun, 643, 4 N. Y. Supp. 89. See, also, post, p. 38, and notes.

⁴ *Paynter v. Williams*, 1 Crompt. & M. 810; *DAY v. CATON*, 119 Mass. 513, 20 Am. Rep. 347; *Huck v. Flentye*, 80 Ill. 253; *De Wolf v. City of Chicago*, 26

So, also, if a person sends goods to another, not under such circumstances as reasonably to lead the latter to suppose them a gift, and the latter uses or consumes them, he will be liable on an implied promise to pay what the goods are reasonably worth. The offer is made by sending the goods; the acceptance, by their use or consumption, which is in fact a promise to pay their price.⁵

Where conduct is relied on as constituting acceptance, it must be something more than mere silence; it must be silence under such circumstances as to amount to acquiescence or assent.⁶

"Implied Contracts"—The Term Explained.

Contracts implied from the conduct of the parties are implied as a matter of fact, and not as a matter of law. There is, in fact, an agreement between the parties, though it is shown by their acts, and not by express words.⁷ If a man says to another in words, "I will sell you this article for the market price," and the latter, taking it, says in words, "I accept your offer, and will pay the price," there is an express contract, evidenced by express words. If a man sends another goods under such circumstances as to show that he expects payment, and the latter accepts and consumes the goods, there is an implied contract that he will pay the market price, evidenced by the con-

Ill. 444; *Hartupee v. City of Pittsburg*, 97 Pa. 107; *Thomas v. Coal Co.*, 43 Mo. App. 653; *Lockwood v. Robbins*, 125 Ind. 398, 25 N. E. 455. No promise, however, on the part of a person benefited by work, can be implied where the work was done under a special contract with another person. *Walker v. Brown*, 28 Ill. 378, 81 Am. Dec. 287; *Massachusetts Gen. Hospital v. Fairbanks*, 129 Mass. 78, 37 Am. Rep. 303. A promise cannot be implied where the whole matter is covered by an express contract. See *Phelps v. Sheldon*, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; *Waite v. Merrill*, 4 Greenl. (Me.) 102, 16 Am. Dec. 238; *Stockett v. Watkins' Adm'rs*, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; *King v. Woodruff*, 23 Conn. 56, 60 Am. Dec. 125.

⁵ *Hart v. Mills*, 15 Mees. & W. 87; *Manor v. Pyne*, 3 Bing. 288; *Larkin v. Lumber Co.*, 42 Mich. 296, 3 N. W. 904; *Kinney v. Railroad Co.*, 82 Ala. 368, 3 South. 113; *Indiana Mfg. Co. v. Hayes*, 155 Pa. 160, 26 Atl. 6; *Empire Steam Pump Co. v. Iuman*, 59 Hun. 230, 12 N. Y. Supp. 948; *Rosenfield v. Swenson*, 45 Minn. 190, 47 N. W. 718; *Hobbs v. Whip Co.*, 158 Mass. 194, 33 N. E. 495. The person to whom the goods are sent must in some way deal with them as his own in order that an acceptance may be implied. If he does not choose to take them, he is not bound to return them. *Pol. Cont.* 11. Where goods are ordered, and only a part are sent, the person so ordering need not accept them. If he does so, however, he impliedly agrees to pay what the goods are reasonably worth. *Chapman v. Dease*, 34 Mich. 375; *DERMOTT v. JONES*, 23 How. 220, 16 L. Ed. 442; *Star Glass Co. v. Morey*, 108 Mass. 570; *Goodwin v. Merrill*, 13 Wis. 737; *Richards v. Shaw*, 67 Ill. 222. But see *Kein v. Tupper*, 52 N. Y. 550.

⁶ *ROYAL INS. CO. v. BEATTY*, 119 Pa. 6, 12 Atl. 607, 4 Am. St. Rep. 622; *O'Neal v. Knippa* (Tex. Sup.) 19 S. W. 1020.

⁷ *Pol. Cont.* 9-11; *Leake, Cont.* 11.

duct of the parties in sending the goods on the one side, and in accepting and using them on the other. Sending the goods is an offer to sell them, and accepting and using them is an acceptance of the offer. There is no difference in the two contracts except in the evidence by which the agreement is shown.⁸ The distinction between contracts implied from the conduct of the parties and so-called "implied contracts" which are properly "quasi contracts," has been explained.⁹

Same—Relationship of the Parties.

Where one person renders services for another, or supports another, the relationship of the parties is of great weight in determining their intention. If the relationship is that of parent and child, even though the child has attained his or her majority, there is a presumption that no compensation was intended;¹⁰ and this applies not only where the relationship of parent and child actually exists, but also where one of the parties stands in loco parentis to the other.¹¹ Most courts do not stop at this, but apply the rule wherever the parties occupy a near relationship, or, though not related at all, or only distantly, are members of the same family, and the services consist either in household or other family duties by one party, and support and maintenance by the other.¹² In some cases the presumption against the existence of a contract does not exist.¹³ As to this, the authorities are in conflict. In some states, a presumption that the services were gratuitous only arises in the case of parent and child, or child and person standing in loco parentis. In most states, however, the presumption arises in all

⁸ BIXBY v. MOOR, 51 N. H. 402.

⁹ Ante, p. 8.

¹⁰ Young v. Herman, 97 N. C. 280, 1 S. E. 792; Bantz v. Bantz, 52 Md. 693; Cowan v. Musgrave, 73 Iowa, 384, 35 N. W. 496; McGarvy v. Roods, 73 Iowa, 363, 35 N. W. 488; Hudson v. Hudson, 90 Ga. 581, 16 S. E. 349; In re Young's Estate, 148 Pa. 575, 24 Atl. 124; Howe v. North, 69 Mich. 272, 37 N. W. 213; Allen v. Allen, 60 Mich. 635, 27 N. W. 702; Grant v. Grant, 109 N. C. 710, 14 S. E. 90.

¹¹ Dodson v. McAdams, 96 N. C. 149, 2 S. E. 453, 60 Am. Rep. 408; Ormsby v. Rhoades, 59 Vt. 505, 10 Atl. 722; Starkie v. Perry, 71 Cal. 495, 12 Pac. 508; Wyley v. Bull, 41 Kan. 206, 20 Pac. 855; Appeal of Barhite, 126 Pa. 404, 17 Atl. 617; Harris v. Smith, 79 Mich. 54, 44 N. W. 169, 6 L. R. A. 702.

¹² Disbrow v. Durand, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678; Cone v. Cross, 72 Md. 102, 19 Atl. 391; Curry v. Curry, 114 Pa. 367, 7 Atl. 61; Feiertag v. Feiertag, 73 Mich. 297, 41 N. W. 414; Patterson v. Collar, 31 Ill. App. 340; Collar v. Patterson, 137 Ill. 403, 27 N. E. 604; Reeves' Estate v. Moore, 4 Ind. App. 492, 31 N. E. 44; Gerz v. Weber, 151 Pa. 396, 25 Atl. 82.

Where a woman married a man and lived with him till his death, but afterwards learned that he had a wife living, held that she could not recover in an action of contract against his administrator for her services in keeping house. COOPER v. COOPER, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721.

¹³ In re Shubart's Estate, 154 Pa. 230, 26 Atl. 202.

cases where the parties occupy the position of members of the same family; the one furnishing support, and the other rendering services. In all cases it may be shown that there was an agreement for compensation.* As said in an Indiana case, a contract will be implied, notwithstanding the relationship, where there is hope of compensation on one side and expectation to award it on the other.¹⁴

COMMUNICATION OF OFFER.

10. An offer is made when it is communicated to the offeree.

It is plain that without communication of the offer there can be no consensus, and therefore no contract.

Thus, in the case of an offer of a promise for an act, if the offeree does the act in ignorance of the offer, he is not entitled to the benefit of the promise. It is for this reason that a person who does an act for which a reward is offered, in ignorance of the offer, cannot claim the reward.¹⁵

Again, if a person does work for another under such circumstances that it could not reasonably be supposed that he meant to work for nothing, the doing of the work is an offer, and acquiescence in its doing may be an acceptance. But if the offer is not communicated to the person to whom it is intended to be made, there can be no acquiescence.

Thus, where a person who had been engaged to command a ship threw up his command during the voyage, but helped to work the vessel home, and then claimed compensation for such services, it was held that he could not recover.¹⁶ Evidence "of a recognition or ac-

*As to the sufficiency of the evidence to show that there was a contract, see *Pritchard v. Pritchard*, 69 Wis. 373, 34 N. W. 506; *McMillan v. Page*, 71 Wis. 655, 38 N. W. 173; *Shane v. Smith*, 37 Kan. 55, 14 Pac. 477; *Petty v. Young*, 43 N. J. Eq. 654, 12 Atl. 392; *Appeal of Lindsey* (Pa. Sup.) 15 Atl. 434; *Doremus v. Lott*, 49 Hun, 284, 1 N. Y. Supp. 793; *Hill v. Hill*, 121 Ind. 255, 23 N. E. 87; *Hogg v. Laster*, 56 Ark. 382, 19 S. W. 975; *Henzler's Estate v. Bossard*, 6 Ind. App. 701, 33 N. E. 217; *Zimmerman v. Zimmerman*, 129 Pa. 229, 18 Atl. 129, 15 Am. St. Rep. 720; *Havens v. Havens*, 50 Hun, 605, 3 N. Y. Supp. 219; *Spitzmiller v. Fisher*, 77 Iowa, 289, 42 N. W. 197; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; *Davis v. Gallagher*, 55 Hun, 593, 9 N. Y. Supp. 11; *Kirkpatrick v. Gallagher*, 34 S. C. 255, 13 S. E. 450; *McCormick v. McCormick*, 1 Ind. App. 594, 28 N. E. 122; *Story v. Story*, 1 Ind. App. 284, 27 N. E. 573; *Stock v. Stoltz*, 137 Ill. 349, 27 N. E. 604; *Wayman v. Wayman* (Ky.) 22 S. W. 557; *O'Kelly v. Faulkner*, 92 Ga. 521, 17 S. E. 847.

¹⁴ *Huffman v. Wyrick*, 5 Ind. App. 183, 31 N. E. 823.

¹⁵ Post, p. 40.

¹⁶ *Taylor v. Laird*, 25 L. J. Exch. 329. And see *BARTHOLOMEW v. JACKSON*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237, in which it was held that a

ceptance of services," it was said, "may be sufficient to show an implied contract to pay for them, if at the time the defendant had power to accept or refuse the services;" but in this case the defendant never had such an option, and repudiated the services when he became aware of them. The offer, not having been communicated to the owner of the vessel, did not admit of acceptance, and could give no rights against him. As said in the case mentioned: "Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"

Terms of Offer Partly Uncommunicated.

If an offer contains on its face the terms of a complete contract, the acceptor will not be bound by any other terms intended to be included, unless he knew those terms, or had their existence brought to his knowledge, and was capable of informing himself of their nature.¹⁷ Illustrations of this frequently arise in the case of contracts of carriage or bailment with a railroad company or warehouseman, evidenced by a ticket or other document containing terms modifying the liability of the company or warehouseman as carrier or bailee, though, of course, they may arise in the case of other contracts.

The law on this point was thus stated in an English case: "If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivery to him of the ticket in such a manner that he could see that there was writing on it, was, in the opinion of the jury, reasonable notice that the writing contained conditions."¹⁸ In all

person who removed another's property without the latter's knowledge, to prevent its destruction by fire, could not recover for his services, because no offer was ever communicated. See, also, *Thornton v. Village of Sturgis*, 38 Mich. 639; *Nagle v. McMurray*, 84 Cal. 539, 24 Pac. 107; *Burrows v. Ward*, 15 R. I. 346, 5 Atl. 500; *Brennan v. Chapin* (Com. Pl. N. Y.) 19 N. Y. Supp. 237; *Mann v. Farnum*, 17 Colo. 427, 30 Pac. 332.

¹⁷ In order that a prospectus of a proposed publication may become a part of the contract of a subscriber for the work to be published, so that he may take advantage of statements contained therein, it must appear that the contents of the prospectus were communicated to him, so that he may be supposed to have been influenced thereby. *Tichnor v. Hart*, 52 Minn. 407, 54 N. W. 369.

¹⁸ *Parker v. Railway Co.*, 2 C. P. Div. 423. See, also, *Richardson v. Rountree* [1894] App. Cas. 217; *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L.

cases, however, the question is the same, namely, have the terms of the offer been fully communicated to the acceptor? And the tendency of judicial decision is towards a general rule that, if a man accepts a document which purports to contain the terms of an offer, he is bound by all the terms, though he may not choose to inform himself of their tenor, or even of their existence.¹⁹

Same—Contract under Seal.

There is one exception to the inoperative character of an uncommunicated offer. This is in case of an offer under seal. The position of the party making the offer, however, is not that he is bound by the contract, for this can only be when an offer is accepted, but that he has made an offer which he cannot withdraw. For this reason the matter is best dealt with under the head of revocation of offers.²⁰

Ed. 1039. Where a ticket by steamer from Dublin to Whitehaven contained on its face only the words, "Dublin to Whitehaven," it was held that the purchaser was not bound by conditions on the back of the ticket, which he had not seen, since the ticket was a complete contract on its face. *Henderson v. Stevenson*, L. R. 2 H. L. 470.

On the other hand, where a ticket had written on its face the words, "Subject to the conditions on the other side," and the person to whom it was issued admitted knowledge that there were conditions, but said he had not read them, the conditions contained on the back were held binding notwithstanding they were not read. *Harris v. Railway Co.*, 1 Q. B. Div. 515.

In another case the ticket contained on its face the words, "See back," and the person to whom it was given admitted knowledge of writing on the ticket, but denied all knowledge that the writing contained conditions. It was held that he was bound by the conditions if the jury were of opinion that the ticket amounted to a reasonable notice of their existence. *Parker v. Southeastern Ry. Co.*, supra.

¹⁹ *Burke v. Railway Co.*, 5 C. P. Div. 1; *Watkins v. Rymill*, 10 Q. B. Div. 178; *McClure v. Railroad Co.*, 34 Md. 532, 6 Am. Rep. 345; *Johnson v. Same*, 63 Md. 106; *BOYLAN v. RAILROAD CO.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; *Durgin v. Express Co.*, 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453; *Davis v. Railroad Co.*, 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; *FONSECA v. STEAMSHIP CO.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; *Schaller v. Railway Co.*, 97 Wis. 31, 71 N. W. 1042. But some courts hold that, where a contract limiting the common-law liability of the carrier is contained in a bill of lading, the burden is on the carrier to show that the limitations were assented to. See *Michigan Cent. R. v. Manufacturing Co.*, 16 Wall. 318, 21 L. Ed. 297; 9 Cyc. Law & Proc. 263. One who accepts a document reasonably purporting to be a mere check or voucher, and not a contract, without knowledge of stipulations contained in it, does not assent to such stipulations. *MALONE v. RAILROAD CORP.*, 12 Gray (Mass.) 388, 74 Am. Dec. 598. See *FONSECA v. STEAMSHIP CO.*, supra.

²⁰ Post, p. 32.

NECESSITY AND EFFECT OF ACCEPTANCE.

17. An offer before it will become a binding promise must be accepted.

It is the universal rule that an offer must be accepted before it will become a binding promise, and result in a contract.²¹ This rule springs from the very nature of contract as involving the element of agreement.²² An unaccepted offer, therefore, cannot create any rights, or bind the party making it to the party to whom it is made. A fortiori, it cannot bind the party to whom it is made.²³ "A contract," it has been said by Pothier, "includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. A *pollicitation* is a promise not yet accepted by the person to whom it is made. *Pollicitatio est solius offerentis promissum*. A *pollicitation*, according to the rules of mere natural law, does not produce what can be properly called an obligation; and the person who has made the promise may retract it any time before it is accepted; for there cannot be any obligation without a right being acquired by the person in whose favor it is contracted against the party bound. Now, as I cannot, by the mere act of my own mind, transfer to another a right in my goods, without an intention on his part to accept them, neither can I by my promise confer a right against my person, until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right."²⁴

An offer, as we shall presently see, can be revoked at any time before acceptance. Acceptance, whether by words or by conduct,

²¹ *PAYNE v. CAVE*, 3 Term R. 148; *Tuttle v. Love*, 7 Johns. (N. Y.) 470; *Tucker v. Woods*, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; *First Nat. Bank v. Hall*, 101 U. S. 43, 25 L. Ed. 822; *McKinley v. Watkins*, 13 Ill. 140; *Bruce v. Bishop*, 43 Vt. 161; *Weiden v. Woodruff*, 38 Mich. 130; *Brown v. Rice*, 29 Mo. 322; *Belfast & M. L. R. Co. v. Inhabitants of Unity*, 62 Me. 148; *Bower v. Blessing*, 8 Serg. & R. (Pa.) 243; *King v. Warfield*, 67 Md. 246, 9 Atl. 539. 1 Am. St. Rep. 384; *Missouri Pac. Ry. Co. v. Railway Co. (C. C.)* 31 Fed. 864; *Etheredge v. Barkley*, 25 Fla. 814, 6 South. 861; *Hodges v. Sublett*, 91 Ala. 588, 8 South. 800; *Graff v. Buchanan*, 46 Minn. 254, 48 N. W. 915; *Bronson v. Herbert*, 95 Mich. 478, 55 N. W. 359; *McCormick Harvesting Mach. Co. v. Richardson*, 89 Iowa, 525, 56 N. W. 682.

²² Ante, p. 2. Suppose A. makes an offer by letter to B. to sell him certain goods at a certain price, and B., not knowing of the offer, makes an offer by letter to A. to buy the goods at that price, and the letters cross each other. This is not sufficient to constitute a contract, for there is no acceptance by either of the other's offer, though it may be said that the minds of the parties are *ad idem*. See *TINN v. HOFFMAN*, 29 L. T. (N. S.) 271.

²³ *STENSGAARD v. SMITH*, 48 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205; *Melchers v. Springs*, 33 S. C. 279, 11 S. E. 788.

²⁴ Poth. Obl. p. 1, c. 1, § 1, art. 2.

supplies the element of agreement, which binds the party making it to a fulfillment of its terms.²⁶ It changes the character of the offer, and makes it a promise.²⁶

COMMUNICATION OF ACCEPTANCE.

18. Where the offer contemplates the performance of or forbearance from an act as the consideration of the promise of the offeror, the performance or forbearance is an acceptance, unless the offeror expressly or impliedly prescribes that the acceptance must be communicated.
19. Where the offer contemplates a promise as the consideration of the promise of the offeror, communication of the acceptance is essential, unless the offer contemplates that the performance of some overt act manifesting an intention to accept shall be an acceptance, in which case performance of the act is an acceptance.
20. Where the offer contemplates the dispatch of an acceptance by means beyond the acceptor's control, as by post, telegraph, or the offeror's messenger, an acceptance so dispatched is effective from the time of dispatch, unless the offeror makes the formation of the contract dependent upon actual communication to himself.

It is frequently said that it is essential to the formation of a contract that the acceptance be communicated, but, as already intimated, such is far from being the fact. It is, indeed, true that acceptance must be more than mere mental assent.²⁷ Where, for instance, a person by letter offered to buy another's horse for a certain price,

²⁶ HARRIS' CASE, L. R. 7 Ch. App. 587; *Thruston v. Thornton*, 1 Cush. (Mass.) 91; *Bowen v. Tipton*, 64 Md. 275, 289, 1 Atl. 861; *Equitable Endowment Ass'n v. Fisher*, 71 Md. 430, 18 Atl. 808; *Fried v. Insurance Co.*, 50 N. Y. 243; *White v. Baxter*, 71 N. Y. 254; *Hamilton v. Insurance Co.*, 5 Pa. 339; *Wheeler v. Railroad Co.*, 115 U. S. 29, 5 Sup. Ct. 1061, 29 L. Ed. 341; *Hawkinson v. Harmon*, 69 Wis. 551, 35 N. W. 28; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Merchant v. O'Rourke*, 111 Iowa, 351, 82 N. W. 759. A bid at an auction sale is accepted when the hammer is struck down, and the contract is then complete. *PAYNE v. CAVE*, 3 Term R. 148; *Blossom v. Railway Co.*, 3 Wall. 196, 18 L. Ed. 43; *Ives v. Tregent*, 29 Mich. 390. Where an offer is made containing conditions, an acceptance without qualification is an acceptance of the conditions, and makes a binding contract. *Lawrence v. Railway Co.*, 84 Wis. 427, 54 N. W. 797.

²⁶ See *Gartner v. Hand*, 86 Ga. 558, 12 S. E. 878.

²⁷ *WHITE v. CORLIES*, 46 N. Y. 467; *FELTHOUSE v. BINDLEY*, 11 C. B. (N. S.) 869; *IEBB'S CASE*, L. R. 4 Eq. 9; *Brogden v. Railway Co.*, L. R. 2 App. Cas. 691; *Stitt v. Huidekopers*, 17 Wall. 385, 21 L. Ed. 644; *MAC-TIER'S ADM'RS v. FRITH*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *Van Valkenburg v. Rogers*, 18 Mich. 180; *Strasburg R. R. Co. v. Echternacht*, 21 Pa. 220, 60 Am. Dec. 49; *Ueberroth v. Riegel*, 71 Pa. 280; *Beckwith v. Cheever*, 21 N. H. 41; *Trounstone v. Sellers*, 35 Kan. 417, 11 Pac. 441; *Gilman v. Kibler*,

adding, "If I hear no more about him, I consider the horse is mine at* that price," and no answer was returned, it was held that there was no contract, and this, though it appeared that the person to whom the offer was sent had made up his mind to accept, and had stated to a third person that the horse was sold.²⁸ A person making an offer may indicate some overt act the performance of which shall be a sufficient manifestation of acceptance, but the statement to a third person that the horse was sold was not such an act, and the silent assent of the offeree was not an acceptance.

Whether or not communication of the acceptance is essential to the formation of a contract must depend upon the nature and terms of the offer; that is, upon whether the offeror proposes to be bound upon the performance of an act by the offeree, or upon his communication of his acceptance of the offer. "Where a person in an offer made by himself to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person * * * to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the consideration is a sufficient acceptance without notification."²⁹ If the offer contemplates the doing or forbearance from the doing of an act as the consideration of the promise of the offeror, unless the offer prescribes communication, the mere performance of the consideration completes the contract.³⁰ Thus, if a person orders goods of a merchant, who ships them pursuant to the order, the contract of sale is complete upon the shipment;³¹ and if a person offers a reward for the return of lost arti-

5 Humph. (Tenn.) 19; *Stuart v. Railroad Co.*, 32 Grat. (Va.) 146; *Johnson v. Jacobs*, 42 Minn. 168, 44 N. W. 6; *Cozart v. Herndon*, 114 N. C. 252, 19 S. E. 158.

In *Lancaster v. Elliott*, 28 Mo. App. 86, it was held that a proposal by defendant to relinquish certain rights against plaintiff was not accepted by writing on the proposal the word "Accepted," and depositing in bank a sum of money to be applied as required by the proposal, where both the proposal and the deposit remained under plaintiff's control.

Where an order for goods is given to an agent of the manufacturer, a letter from the latter to the agent, without any notice to the person who gave the order, is not an acceptance, so as to render the order binding. *Harvey v. Duffey*, 99 Cal. 401, 33 Pac. 897.

²⁸ *FELTHOUSE v. BINDLEY*, supra.

²⁹ *CARLILL v. SMOKE-BALL CO.* (1893) 1 Q. B. 256.

³⁰ *Brogden v. Railway Co.*, L. R. 2 App. Cas. 691; *FIRST NAT. BANK v. WATKINS*, 154 Mass. 385, 28 N. E. 275; *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644.

³¹ *Finch v. Mansfield*, 97 Mass. 89; *Smith v. Edwards*, 156 Mass. 221, 30 N. E. 1017; *Kelsea v. Manufacturing Co.*, 55 N. J. Law, 320, 26 Atl. 907, 22 L. R. A. 415; *BOIT v. MAYBIN*, 52 Ala. 252; *Sarbecker v. State*, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624. See *Brogden v. Railway Co.*, 2 App. Cas. 666.

cles, or for information, the contract is complete upon transmission of the articles or the information to the offeror.³² So, as we have seen, if a person asks another to work for him, unless a particular form of acceptance is prescribed, the latter may accept the offer simply by performing the service;³³ and if a person sends goods to another, who uses them, he is liable to pay for them.³⁴ Yet, even where the offer is of a promise for an act, the offeror may, of course, make communication of acceptance a condition of the formation of a contract.

An apparent exception to the rule that performance of the act without notification of acceptance completes the contract is found in the cases which hold that an offer to guaranty future advances to be made or credit to be extended to a third person, and the like, does not ripen into a contract upon the making of the advances or extending the credit, but that notice of acceptance by the guarantee is essential.³⁵ These cases have been put upon the untenable ground that the acceptance of the offeree must be signified to the offeror to make a binding contract, and also upon the ground that the requirement of notice is reasonable, as enabling the guarantor to know the nature and extent of his liability, to guard himself against losses which might otherwise be unknown to him, and to avail himself of appropriate means to compel the other parties to discharge him from future liabilities. In the offer of a guaranty, it seems that either by the custom of merchants, or perhaps by the inherent nature of the transaction, it is implied in the offer that notice shall be given with due diligence, so that the promisor may know that the contract has been made.³⁶ The cases, however, are not unanimous, and some courts have held that the contract is complete when the offer has been acted upon, and that notice is not necessary.³⁷

On the other hand, where the offer contemplates a promise as the

³² Post, p. 38.

³³ Ante, p. 15.

³⁴ Ante, p. 16.

³⁵ *Edmondston v. Drake*, 5 Pet. (U. S.) 624, 8 L. Ed. 251; *Adams v. Jones*, 12 Pet. 207, 9 L. Ed. 1058; *Davis v. Wells*, 104 U. S. 159, 26 L. Ed. 686; *DAVIS SEWING MACHINE CO. v. RICHARDS*, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480; *Acme Mfg. Co. v. Reed*, 197 Pa. 359, 47 Atl. 205, 80 Am. St. Rep. 832; *De Cremer v. Anderson*, 113 Mich. 578, 71 N. W. 1090; *German Sav. Bank v. Roofing Co.*, 112 Iowa, 184, 84 N. W. 960, 51 L. R. A. 758 (full citation of cases).

³⁶ *BISHOP v. EATON*, 161 Mass. 496, 37 N. E. 665, 42 Am. St. Rep. 437. See, also, *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644.

³⁷ *Wilcox v. Draper*, 12 Neb. 138, 10 N. W. 579, 41 Am. Rep. 763; *Lininger & Metcalf Co. v. Wheat*, 49 Neb. 567, 68 N. W. 941; *Farmers' & Mechanics' Bank v. Kercheval*, 2 Mich. 504; *Crittenden v. Fiske*, 46 Mich. 70, 8 N. W. 714, 41 Am. Rep. 146; *Powers v. Bumeratz*, 12 Ohio St. 273; (cf. *Wise v. Miller*, 45 Ohio St. 388, 14 N. E. 218); *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Union Bank v. Coster's Ex'rs*, 3 N. Y. 203, 53 Am. Dec. 280. See, also, *Manry v. Waxelbaum Co.*, 108 Ga. 14, 33 S. E. 701.

consideration of the promise of the offeror, it is obvious that words or conduct upon the part of the offeree indicating to the former an agreement to be bound is essential, or at least that the offeree must indicate his intention to be bound by some overt act, not necessarily an act brought to the knowledge of the offeror, but an act which, from the nature and terms of the offer, must have been contemplated by the offeror as an acceptance. Thus, where the defendants wrote to the plaintiff, who had furnished an estimate for fitting up their offices, "Upon an agreement to finish the fitting up * * * in two weeks from date, you can begin at once," but countermanded the offer after the plaintiff had bought lumber and begun work thereon, it was held error to charge the jury that the plaintiff need not indicate to the defendants his acceptance of their offer and that the purchase of the stuff and working on it after receiving the note made a binding contract.³⁸ The offer contemplated the plaintiff's promise or agreement to finish in two weeks as an acceptance, and there was nothing in his conduct that indicated to the defendants his agreement to perform. The offeror may, however, indicate some act by which the offeree may manifest his intention to be bound, the performance of which, without actual communication, shall be sufficient as an acceptance, and when the offeree has thus indicated his intention the contract is complete. It seems that the rule which prevails in regard to contracts by correspondence must rest upon this ground.³⁹

Contract by Correspondence.

It is now settled that the acceptance in case of contract by correspondence where an answer is invited by post is complete as soon as the letter of acceptance is dispatched.⁴⁰ Where an offer is made

³⁸ WHITE v. CORLIES, 46 N. Y. 467.

³⁹ "I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request, expressed or implied, that he must signify his acceptance by doing some particular thing, then as soon as he does that thing he is bound. If a man sent an offer abroad saying, 'I wish to know whether you will supply me with goods at such and such a price, and if you agree to that you must ship the first cargo as soon as you get this letter,' there can be no doubt that as soon as the cargo was shipped the contract would be complete, and if the cargo went to the bottom of the sea it would go to the bottom of the sea at the risk of the orderer. So, again, where, as in the case of EX PARTE HARRIS, IN RE IMPERIAL LAND COMPANY OF MARSEILLES, Law Rep. 7 Ch. App. 587, a person writes a letter and says, 'I offer to take an allotment of shares,' and he expressly or impliedly says, 'If you agree with me, send an answer by the post,' there, as soon as he has sent that answer by the post, and put it out of his control, and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound, I agree the contract is perfectly plain and clear." Brogden v. Railway Co., 2 App. Cas. 666. 691, per Lord Blackburn.

⁴⁰ ADAMS v. LINDSELL, 1 Barn. & Ald. 681; POTTER v. SANDERS, 6 Hare, 1; Levy v. Cohen, 4 Ga. 1; TAYLOE v. INSURANCE CO., 9 How. 390,

by post it may be assumed that an answer by post is invited unless the contrary is indicated, but the rule is not necessarily confined to cases where the offer is made in that manner. "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as posted."⁴¹ The rule has not been established without vigorous dissent.⁴²

There was at first some hesitation in applying this rule in cases where the letter of acceptance was lost or delayed in transmission; but it is now settled by the great weight of authority that, when an acceptance has been posted, the contract is complete, and cannot be affected by the subsequent fate of the letter.⁴³ "The acceptor," it has been said, "in posting the letter has 'put it out of his control,

13 L. Ed. 187; *AVERILL v. HEDGE*, 12 Conn. 424; *VASSAR v. CAMP*, 11 N. Y. 441; *Darlington Iron Co. v. Foote* (C. C.) 16 Fed. 646; *THOMSON v. JAMES*, 18 Dunl., B. & M. 1; *MINNESOTA LINSEED OIL CO. v. LEAD CO.*, 4 Dill. 431, Fed. Cas. No. 9,635; *MACTIER'S ADM'RS v. FRITH*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *HARRIS' CASE*, L. R. 7 Ch. 587; *TREVOR v. WOOD*, 36 N. Y. 307, 93 Am. Dec. 511; *WHEAT v. CROSS*, 31 Md. 99, 103, 1 Am. Rep. 28; *Ferrier v. Storer*, 63 Iowa, 484, 19 N. W. 288, 50 Am. Rep. 752; *Stockham v. Stockham*, 32 Md. 196; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409; *Perry v. Iron Co.*, 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902; *Calhoun v. Atchison*, 4 Bush (Ky.) 261, 96 Am. Dec. 299; *Hamilton v. Insurance Co.*, 5 Pa. 339; *Abbott v. Shepard*, 48 N. H. 14; *Hunt v. Higman*, 70 Iowa, 406, 30 N. W. 769; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Cobb v. Foree*, 38 Ill. App. 255. Contra, *McCULLOCH v. INSURANCE CO.*, 1 Pick. (Mass.) 278 (but see *BRAUER v. SHAW*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387); *Scottish-American Mortg. Co. v. Davis* (Tex. Civ. App.) 72 S. W. 217 (notwithstanding telegram recalling letter).

⁴¹ *HENTHORN v. FRASER* [1892] 2 Ch. 27, per Lord Herschell.

⁴² See dissenting opinion of Bramwell, L. J., in *HOUSEHOLD INS. CO. v. GRANT*, 4 Exch. Div. 221; *BRITISH & AM. TEL. CO. v. COLSON*, L. R. 6 Exch. 108; *McCULLOCH v. INSURANCE CO.*, 1 Pick. (Mass.) 278; *Langdell. Sum. Cont. §§ 14, 15*; *Parsons, Cont. (8th Ed., Williston) *484, note 1*.

There is much force in the argument that communication is essential to the counter promise which is the consideration, and that hence the acceptance cannot take effect until its receipt. Moreover, granting that the offeror must be taken to have contemplated that the post may be used as a means of communicating the acceptance, it is its communication, and not the mere putting it in course to be communicated, which he practically contemplates. It is a somewhat violent assumption to attribute to him any different intention than that which would be expressed by making the offer conditional upon receipt of the acceptance, which would be enforced.

⁴³ *HOUSEHOLD INS. CO. v. GRANT*, 4 Exch. Div. 221; *MACTIER'S ADM'RS v. FRITH*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *TAYLOE v. INSURANCE CO.*, 9 How. 390, 13 L. Ed. 187; *Washburn v. Fletcher*, 42 Wis. 152; *VASSAR v. CAMP*, 11 N. Y. 441; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Bryant v. Booze*, 55 Ga. 438; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Duncan v. Topham*, 8 C. B. 225; *Chytraus v. Smith*, 141 Ill. 231, 30 N. E. 450;

and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound.' How, then, can a casualty in the post, whether resulting in delay—which in commercial transactions is often as bad as no delivery—or in nondelivery, unbind the parties or unmake the contract?"⁴⁴ The rule is the same where the telegraph is properly used as the mode of signifying acceptance, and the contract is complete on delivery of the message to the telegraph company.⁴⁵ This rule, of course, does not apply where the offer expressly or by implication stipulates that the contract is to be complete, and the offer binding, when the acceptance is received. In such a case the mailing of the acceptance is not enough.⁴⁶ To constitute an acceptance, however, the letter must be actually and properly posted. If it is delivered to an agent of the acceptor, and he neglects to mail it, or to a postman not authorized to receive letters, or if it is posted without a stamp, or improperly addressed, it is not an acceptance.⁴⁷

CHARACTER, MODE, PLACE, AND TIME OF ACCEPTANCE.

21. The acceptance of an offer to result in a contract must be—

- (a) Absolute and unconditional.
- (b) Identical with the terms of the offer.
- (c) In the mode, at the place, and within the time expressly or impliedly required by the offer.

The acceptance of an offer must be absolute, and identical with the terms of the offer; or, as it has been expressed, "an acceptance to be good must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand."⁴⁸ Unless this is so, there is no meeting of minds and ex-

College Mill Co. v. Fidler (Tenn. Ch.) 58 S. W. 382. See, contra, BRITISH & AM. TEL. CO. v. COLSON, L. R. 6 Exch. 108, disapproved in Harris' Case, *supra*.

⁴⁴ HOUSEHOLD INS. CO. v. GRANT, 4 Exch. Div. 221.

⁴⁵ MINNESOTA LINSEED OIL CO. v. LEAD CO., 4 Dill. 431, Fed. Cas. No. 9,635; TREVOR v. WOOD, 36 N. Y. 307, 93 Am. Dec. 511; BRAUER v. SHAW, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387.

⁴⁶ VASSAR v. CAMP, 11 N. Y. 441; LEWIS v. BROWNING, 130 Mass. 173; HAAS v. MYERS, 111 Ill. 421, 53 Am. Rep. 634.

⁴⁷ Henderson v. Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332; Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35; Blake v. Insurance Co., 67 Tex. 160, 2 S. W. 368, 60 Am. Rep. 15; IN RE LONDON & N. BANK [1900] 1 Ch. 220. Deposit of a letter in a street letter box is equivalent to deposit in the post office. Wood v. Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597.

⁴⁸ Knowlton's Anson, Cont. 22, note; ELIASON v. HENSHAW, 4 Wheat. 225, 4 L. Ed. 556; Potts v. Whitehead, 23 N. J. Eq. 512; Thomas v. Greenwood, 69 Mich. 215, 37 N. W. 195; MACTIER'S ADM'RS v. FRITH, 6 Wend.

pression of one and the same common intention—the intention expressed by one of the parties is either doubtful in itself, or is different from that of the other. The intention of the parties must be distinct and common to both.⁴⁹

If a person offers to do a definite thing, and the person to whom the offer is made accepts conditionally, or introduces a new term into the acceptance, his answer is not an acceptance. It is either a mere expression of willingness to treat, or it is in effect a counter offer.⁵⁰ A proposal to accept, or an acceptance varying the terms from those offered, is a rejection of the offer, and the offer is then no longer open to acceptance.⁵¹

If a person proposes to sell another property, and the latter accepts "subject to the terms of a contract being arranged" between their solicitors, there is no agreement, for the acceptance is not final, but subject to a discussion to take place between the agents of the parties.⁵² If anything is left for future arrangement, the parties have not agreed.⁵³ It is not to be understood from this that there

(N. Y.) 103, 21 Am. Dec. 262; *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Jordan v. Norton*, 4 Mees. & W. 155; *Corcoran v. White*, 117 Ill. 118, 7 N. E. 525, 57 Am. Rep. 858; *Siebold v. Davis*, 67 Iowa, 560, 25 N. W. 778; *Stagg v. Compton*, 81 Ind. 171; *Corser v. Hale*, 149 Pa. 274, 24 Atl. 285; *Wilkin Mfg. Co. v. Lumber Co.*, 94 Mich. 158, 53 N. W. 1045; *Wristen v. Bowles*, 82 Cal. 84, 22 Pac. 1136; *Scott v. Davis*, 141 Mo. 213, 42 S. W. 714; *Coad v. Rogers*, 115 Iowa, 478, 88 N. W. 947; *SEYMOUR v. ARMSTRONG*, 62 Kan. 720, 64 Pac. 612; *Shady Hill Nursery Co. v. Waterer*, 179 Mass. 318, 60 N. E. 789, 88 Am. St. Rep. 384. See, also, the cases cited in following notes.

As to acceptance by a person other than the one to whom the offer was made, see post, p. 199.

⁴⁹ Ante, p. 2.

⁵⁰ *Hough v. Brown*, 19 N. Y. 111; *Briggs v. Sizer*, 30 N. Y. 647; *Borland v. Guffy*, 1 Grant (Pa.) 394; *Harlow v. Curtis*, 121 Mass. 320; *MACLAY v. HARVEY*, 90 Ill. 525, 32 Am. Rep. 35; *Hammond v. Winchester*, 82 Ala. 470, 2 South. 892; *Crabtree v. Opera-House Co. (C. C.)* 39 Fed. 746; *Hubbell v. Palmer*, 76 Mich. 441, 43 N. W. 442; *Bristol Aerated Bread Co. v. Maggs*, 44 Ch. Div. 616; *Robertson v. Tapley*, 48 Mo. App. 239; *CROSSLEY v. MAY-COCK*, 18 Eq. 180; *Mygatt v. Tarbell*, 85 Wis. 457, 55 N. W. 1031; *Jones v. Daniel* [1894] 2 Ch. 332; *Davenport v. Newton*, 71 Vt. 11, 42 Atl. 1087; *Russell v. Manufacturing Co.*, 106 Wis. 329, 82 N. W. 134; *Harris v. Scott*, 67 N. H. 437, 32 Atl. 770; *Putnam v. Grace*, 161 Mass. 237, 37 N. E. 166.

If so accepted by the original proposer, it becomes a binding promise. *Es-may v. Gorton*, 18 Ill. 483.

⁵¹ *MINNEAPOLIS & ST. L. RY. CO. v. MILL CO.*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; *HYDE v. WRENCH*, 3 Beav. 334; *Virginia Hot Springs Co. v. Harrison*, 93 Va. 569, 25 S. E. 888; *James v. Darby*, 100 Fed. 224, 40 C. C. A. 341.

⁵² *Honeyman v. Marryat*, 6 H. L. Cas. 112. It seems that an acceptance of an offer to sell land, "subject to the title being approved by" the acceptor's attorneys, is not conditional. *Hussey v. Horne-Payne*, 4 App. Cas. 311, 8 Ch. Div. 670.

⁵³ *Martin v. Fuel Co. (C. C.)* 22 Fed. 596; *APPLEBY v. JOHNSON*, L. R. 9 Q. P. 158; *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. Ed. 219; *Utley v.*

must be nothing at all to be done after the acceptance. If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed;⁵⁴ but the parties must intend the agreement to be binding. If, though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract is prepared and signed, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.⁵⁵

An offer to sell a specified quantity of goods cannot be made binding on the proposer by ordering a less quantity, for there is no offer to sell any quantity greater or less than that specified.⁵⁶ And the same is true where the offer is to sell a certain quantity each of several articles, and the person to whom the offer is made orders the specified quantity of one or more of them, but declines the others.⁵⁷ Nor will an order of a certain quantity of goods, accepted by sending a less quantity, impose any liability for the goods sent.⁵⁸ So, also, if a person proposes to sell land to another for a certain sum, and the latter replies that he will give a less sum, there is nothing binding between the parties.⁵⁹ Again, if a person offers to sell land, saying nothing as to the place of payment, and the acceptance specifies that payment shall be made at the acceptor's place of residence, there is no contract, since, under the offer, the proposer would be entitled to payment at his place of residence.⁶⁰

Donaldson, 94 U. S. 29, 24 L. Ed. 54; *First Nat. Bank v. Hall*, 101 U. S. 43, 25 L. Ed. 822; *Brown v. N. Y. Central R. Co.*, 44 N. Y. 79; *Canton Co. v. Railroad Co.*, 21 Md. 383, 396; *First Nat. Bank v. Clark*, 61 Md. 400, 48 Am. Rep. 114; *Bruce v. Bishop*, 43 Vt. 161; *Sibley v. Felton*, 156 Mass. 273, 31 N. E. 10; *Sparks v. Pittsburgh Co.*, 159 Pa. 295, 28 Atl. 152; *Stanley v. Dowdeswell*, L. R. 10 C. P. 102. And see post, p. 42.

⁵⁴ *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Bolton v. Lambert*, 41 Ch. Div. 295; *Bonnewell v. Jenkins*, 8 Ch. Div. 70, 73; *Cheney v. Transportation Line*, 59 Md. 557; *Allen v. Chouteau*, 102 Mo. 309, 14 S. W. 869; *Lawrence v. Railroad Co.*, 84 Wis. 427, 54 N. W. 797; *SANDERS v. FRUIT CO.*, 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757.

⁵⁵ *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Winn v. Bull*, 7 Ch. Div. 29; *Wills v. Carpenter*, 75 Md. 80, 25 Atl. 415; *Commercial Tel. Co. v. Smith*, 47 Hun (N. Y.) 494.

⁵⁶ *MINNEAPOLIS & ST. L. RY. CO. v. ROLLING-MILL CO.*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; *Michigan Bolt & Nut Co. v. Steel*, 111 Mich. 153, 69 N. W. 241.

⁵⁷ *Thomas v. Greenwood*, 69 Mich. 215, 37 N. W. 195.

⁵⁸ *Bruce v. Pearson*, 3 Johns. (N. Y.) 534. As to implied contract from retaining and using or consuming the goods so sent, see ante, p. 16, and note 5.

⁵⁹ *HYDE v. WRENCH*, 3 Beav. 336. And see post, p. 36, and cases cited.

⁶⁰ *BAKER v. HOLT*, 56 Wis. 100, 14 N. W. 8; *Sawyer v. Brossart*, 67 Iowa, 678, 25 N. W. 876, 5 Am. Rep. 371; *Gilbert v. Baxter*, 71 Iowa, 327, 32 N.

Manner, Place, and Time of Acceptance.

It is also essential that the acceptance shall be made in the manner, at the place, and within the time expressly or impliedly designated in the offer. The proposer has the right to dictate terms in respect to the time, place, and manner of acceptance; and when he does so, like all other terms, they must be complied with. In a leading case on this point the defendant offered to buy flour from the plaintiffs, stating in his offer that the answer should be sent by return of the wagon which brought the offer. The plaintiffs, instead of sending their acceptance by the wagon, mailed it to the defendant at a place other than the destination of the wagon, where it was duly received by him. It was held, however, that he was not bound by the acceptance, as it was not sent to the place prescribed.⁶¹ If an offer asks that the answer be sent by the messenger who brings the offer, or by mail, or by telegraph, it must be so sent, to be effective.⁶² An answer by mail is insufficient if the telegraph is the mode prescribed.⁶³ An offer by mail, which says nothing as to the mode of sending the answer, impliedly requires an answer by mail, or possibly authorizes one by telegraph,⁶⁴ though an acceptance sent by any other mode, and reaching the proposer within a reasonable time, might be held sufficient.⁶⁵ An offer by telegraph impliedly requires an answer by telegraph, and an answer by mail will not be sufficient.

If the offer specifies a time for acceptance, it is a term of the offer, and an acceptance after the specified time will have no effect.⁶⁶ An offer by correspondence, for instance, calling for an answer "in course

W. 364; *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. 690; *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 447; *Maynard v. Tabor*, 53 Me. 511.

⁶¹ *Eliason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556. Where a person residing in one state makes a written offer to a person residing in another, and at a distance, to sell lands, without arranging for a personal meeting, an acceptance by mail is authorized. *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555.

⁶² *Carr v. Duval*, 14 Pet. 83, 10 L. Ed. 361. Putting a letter of acceptance in the private letter box of the proposer has been held sufficient. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285. As to what constitutes mailing a letter, see ante, p. 27, note 47.

⁶³ *HORNE v. NIVER*, 168 Mass. 4, 46 N. E. 393.

⁶⁴ *MACTIER'S EX'RS v. FRITH*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *VASSAR v. CAMP*, 11 N. Y. 441; *TAYLOE v. INSURANCE CO.*, 9 How. 390, 13 L. Ed. 187; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *TREVOR v. WOOD*, 36 N. Y. 307, 93 Am. Dec. 511.

⁶⁵ *Trounstine v. Sellers*, 35 Kan. 447, 11 Pac. 441.

⁶⁶ *Longworth v. Mitchell*, 26 Ohio St. 334; *Potts v. Whitehead*, 20 N. J. Eq. 55; *Britton v. Phillips*, 24 How. Prac. (N. Y.) 111; *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, 27 L. Ed. 145; *Union Nat. Bank v. Miller*, 106 N. O. 347, 11 S. E. 321, 19 Am. St. Rep. 538; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Cummings v. Realty Co.*, 86 Wis. 382, 57 N. W. 43. And see *Park v. Whitney*, 148 Mass. 278, 19 N. E. 161.

of post," or "by return mail," must be accepted by return mail.⁶⁷ It may safely be said that any substantial delay will be fatal, even where an answer by "return mail" is not requested. An acceptance sent three or four days after the receipt of the offer has been held too late, and there seems no reason to doubt that a delay of one day would be equally fatal.⁶⁸ If no time for acceptance is specified, then a reasonable time is implied.⁶⁹ What is a reasonable time must necessarily depend on the nature of the offer and the circumstances of each particular case.

REVOCATION OF OFFER.

22. Until the moment of acceptance, an offer may be revoked, and a subsequent acceptance will be inoperative, except that—

EXCEPTION—An offer under seal cannot be revoked at common law.

23. Notice of revocation must be communicated, to prevent an acceptance from being effective.

Since an offer, unaccepted, creates no rights, it follows that it may be revoked at any time before acceptance.⁷⁰ An order, for instance,

⁶⁷ *DUNLOP v. HIGGINS*, 1 H. L. Cas. 387; *Carr v. Duval*, 14 Pet. 83, 10 L. Ed. 361; *MACLAY v. HARVEY*, 90 Ill. 525, 32 Am. Rep. 35; *AVERILL v. HEDGE*, 12 Conn. 424; *TINN v. HOFFMAN*, 29 Law T. (N. S.) 271. Cf. *Palmer v. Insurance Co.*, 84 N. Y. 63. If the delivery of a letter containing an offer is delayed through the sender's fault, or, it may no doubt be, without the fault of either party, an acceptance as soon as the letter is received is in time. It is by return mail. See *Leake*, Cont. 18; *ADAMS v. LINDSELL*, 1 Barn. & Ald. 681.

⁶⁸ *Taylor v. Rennie*, 35 Barb. (N. Y.) 272; *MINNESOTA LINSEED OIL CO. v. LEAD CO.*, 4 Dill. 435, Fed. Cas. No. 9,635; *MACLAY v. HARVEY*, 90 Ill. 525, 32 Am. Rep. 35; *Ortman v. Weaver* (C. C.) 11 Fed. 358; *DUNLOP v. HIGGINS*, 1 H. L. Cas. 387.

⁶⁹ *RAMSGATE HOTEL CO. v. MONTEFIORE*, L. R. 1 Exch. 109; *MINNESOTA LINSEED OIL CO. v. LEAD CO.*, 4 Dill. 431, Fed. Cas. No. 9,635; *Ferrier v. Storer*, 63 Iowa, 484, 19 N. W. 288, 50 Am. Rep. 752; *AVERILL v. HEDGE*, 12 Conn. 424; *Trounstone v. Sellers*, 35 Kan. 447, 11 Pac. 441; *McCracken v. Harned*, 66 N. J. Law, 37, 48 Atl. 513; *Sanford v. Howard*, 29 Ala. 684, 68 Am. Dec. 101; *Lehigh Valley Coal Co. v. Curtis*, 22 Ill. App. 394; *CHICAGO & G. E. R. CO. v. DANE*, 43 N. Y. 240; *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88; *Omaha Loan & Trust Co. v. Goodman*, 62 Neb. 197, 86 N. W. 1082. This has been held to apply to offers of a reward to the public generally by way of advertisement. *LORING v. CITY OF BOSTON*, 7 Mete. (Mass.) 409. But see post, p. 39.

⁷⁰ *PAYNE v. CAVE*, 3 Term R. 148; *OFFORD v. DAVIES*, 12 C. B. (N. S.) 748; *COUNTESS OF DUNMORE v. ALEXANDER*, 9 Shaw, D. & B. 190; *QUICK v. WHEELER*, 78 N. Y. 300; *Houghwout v. Boisaubin*, 18 N. J. Eq. 315; *SCHENECTADY STOVE CO. v. HOLBROOK*, 101 N. Y. 45, 4 N. E. 4; *WHEAT v. CROSS*, 31 Md. 99, 1 Am. Rep. 28; *BOSTON & M. R. R. CO. v. BARTLETT*, 3 Cush. (Mass.) 224; *Weiden v. Woodruff*, 38 Mich. 130; *Larmon v. Jordan*, 56 Ill. 204; *Crocker v. Railroad Co.*, 24 Conn. 249; *Martin v.*

given to the agent of the party to whom it is made, who has no authority to accept it, is revocable at any time before his principal accepts it; and it is immaterial that the order recites that it is taken with the understanding that it is positive, and not subject to change or countermand.⁷¹ Where an offer is made to several persons, it must be accepted by all before it becomes binding on the proposer, for an acceptance by less than all is not a compliance with the terms of the offer; and it follows that such an offer may be revoked at any time before it is accepted by all.⁷²

Offer under Seal.

An offer made under seal cannot be revoked at common law. Even though uncommunicated to the other party, it seems that it remains open for his acceptance when he becomes aware of it. This results from the common-law rule that a grant under seal is binding on the grantor and those who claim under him, although it was never communicated to the grantee, if it has been duly delivered; and an obligation created by deed, it seems, stands upon the same footing. Where, for instance, a policy of marine insurance was executed by the insurers, and delivered to their clerk to be kept till the insured called for it, and was never accepted by the insured till he claimed the benefit of it on learning of the loss of the ship, it was held that the policy was binding on the insurers. "It is clear on the authorities," it was said, "as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though of course, if he has not previously assented to the making of the deed, the obligee may refuse it."⁷³ "The position of the parties in such a case is anomalous. There can be no agreement where there is no mutual assent. The position of the promisor is that of one who has made an offer which he cannot withdraw, or a conditional promise depending for its binding force on the assent of the promisee."⁷⁴

In the United States it is generally held that delivery of a deed is

Hudson, 81 Cal. 42, 22 Pac. 292; Miller v. Douville, 45 La. Ann. 214, 12 South. 132; Eskridge v. Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; Tucker v. Lawrence, 56 Vt. 467; BENTON v. ASSOCIATION, 170 Mass. 534, 49 N. E. 928, 64 Am. St. Rep. 320. The addition of a new term to an offer is a revocation of that offer. Travis v. Insurance Co., 104 Fed. 486, 43 C. C. A. 653.

⁷¹ National Refining Co. v. Miller, 1 S. D. 548, 47 N. W. 962. And see Challenge Wind & Feed Mill Co. v. Kerr, 93 Mich. 328, 53 N. W. 555; Harvey v. Duffey, 99 Cal. 401, 33 Pac. 897.

⁷² Burton v. Shotwell, 13 Bush (Ky.) 271.

⁷³ XENOS v. WICKHAM, L. R. 2 H. L. 296. See, also, BUTLER & BAKER'S CASE, 3 Coke, 26b; ROBERTS v. SECURITY CO. [1897] 1 Q. B. 111.

⁷⁴ Anson, Cont. (8th Ed.) 32.

not complete without acceptance by the grantee,⁷⁵ and the effect of a mere offer under seal, uncommunicated to the offeree, does not appear to have arisen. Where, however, an offer under seal, in the form of an option, is delivered to the offeree, the doctrine that it cannot be revoked applies, and if the option is exercised by acceptance of the offer within the time limited the agreement will be specifically enforced or damages may be recovered for its breach.⁷⁶

Agreement to Hold Offer Open—"Refusals" and "Options."

An offer, though coupled with a promise to hold it open for acceptance for a specified time, may nevertheless be revoked or withdrawn before the time has expired, provided there is no consideration for the promise to hold the offer open.⁷⁷ Cases of this kind arise where a person gives another the "refusal" of land or goods for a certain time, or an option to buy. If the promise to keep an offer open for a specified time is supported by a valid consideration—as where money is paid or promised for the option or refusal—the promise constitutes a contract in itself, and, of course, is binding.⁷⁸ A failure to keep the offer open would be a breach of contract for which an action for damages would lie, or, upon acceptance, a suit for specific performance.⁷⁹

Communication of Revocation.

Revocation must be communicated, or at least brought to the knowledge of the offeree, to have any effect. As we have seen, an acceptance may take effect at the moment it is dispatched. A revoca-

⁷⁵ Post, p. 55.

⁷⁶ Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 L. Ed. 501; O'Brien v. Bolond, 166 Mass. 481, 44 N. E. 602; MANSFIELD v. HODGDON, 147 Mass. 304, 17 N. E. 544; McMILLAN v. AMES, 33 Minn. 257, 22 N. W. 612; Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; 9 Cyc. Law & Proc. 287.

⁷⁷ COOKE v. OXLEY, 3 Term R. 653 (as to this case, see post, p. 35, note 84); ROUTLEDGE v. GRANT, 4 Bing. 658; HEAD v. DIGGON, 3 Man. & R. 97; STEVENSON v. McLEAN, 5 Q. B. Div. 351; DICKINSON v. DODDS, 2 Ch. Div. 463; CHICAGO & G. E. R. CO. v. DANE, 43 N. Y. 240; STENS-GAARD v. SMITH, 43 Minn. 11, 44 N. W. 669; COLEMAN v. APPLE-GARTH, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; Eskridge v. Glover, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; Larmon v. Jordan, 56 Ill. 206; Weiden v. Woodruff, 38 Mich. 130; Klee v. Grant, 4 Misc. Rep. 88, 23 N. Y. Supp. 855; Connor v. Renneker, 25 S. C. 514; Sault Ste. M., L. & I. Co. v. Simons (C. C.) 41 Fed. 835; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Brown v. Savings Union, 134 Cal. 448, 66 Pac. 592; post, p. 119.

⁷⁸ Grabenhorst v. Nicodemus, 42 Md. 236; Stitt v. Huidekopers, 17 Wall. 384, 21 L. Ed. 644; Bradford v. Foster, 87 Tenn. 4, 9 S. W. 195; Chadsey v. Condley, 62 Kan. 853, 62 Pac. 663.

⁷⁹ Zimmerman v. Brown (N. J. Ch.) 36 Atl. 675; Chadsey v. Condley, 62 Kan. 853, 62 Pac. 663. And see cases cited note 76. But see Litz v. Goosling, 93 Ky. 185, 19 S. W. 527, 21 L. R. A. 127; Graybill v. Brugh, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894.

tion, on the contrary, is not effective until the moment it is received. A person, therefore, who has accepted an offer not known by him to have been revoked, may safely act on the footing that the offer and acceptance constitute a contract binding on both parties. A person who has received an offer by post or telegraph, and posted or telegraphed his acceptance, has thereby created a binding contract, though notice of revocation of the offer has been mailed or wired to him before his acceptance.⁸⁰ The law, it is said, regards the proposer as making his offer during every instant of time that his letter is traveling, and during the period that may be considered as a reasonable time for acceptance. The party to whom the offer is made is therefore entitled to consider that it is still being made, unless he has notice to the contrary, and that his acceptance concludes a binding contract. The revocation cannot be held to be communicated merely because it has been put in the course of transmission. If, after an offer has been posted, or sent by any other means, the proposer sends a withdrawal by such means that it reaches the person to whom the offer was sent at the same time as the offer, this is a good revocation, and an acceptance of the offer will be ineffectual.⁸¹

There has been some difficulty in cases in which the offeror has done some act indicating an intention to retract, as by a sale of property offered, putting it out of his power to perform, but without communicating his revocation. It is probably settled that any overt act clearly showing an intention to revoke is enough, provided the person to whom the offer was made has notice of such act before he accepts. The revocation need not be communicated, but it is sufficient if he has knowledge of acts clearly indicating an intention to revoke.⁸² It is not clearly settled what would be sufficient notice. It might probably be said that the notice must be such as reasonably amounts to knowledge of ~~acts~~ inconsistent with the continuance

⁸⁰ BYRNE v. TIENHOVEN, 5 C. P. Div. 349; HENTHORN v. BRAZER [1892] 66 L. T. (N. S.) 439, 2 Ch. 27; HARRIS' CASE, L. R. 7 Ch. App. 587; TAYLOE v. INSURANCE CO., 9 How. 390, 13 L. Ed. 187; Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. Ed. 790; Hamilton v. Insurance Co., 5 Pa. 342; Lungstrass v. Insurance Co., 48 Mo. 201, 8 Am. Rep. 100; Kempner v. Cohn, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; WHEAT v. CROSS, 31 Md. 99, 1 Am. Rep. 28; HALLOCK v. INSURANCE CO., 26 N. J. Law, 268; Faulkner v. Hebard, 26 Vt. 452; McCotter v. City of New York, 37 N. Y. 325; Weiden v. Woodruff, 38 Mich. 130; Crocker v. Railroad Co., 24 Conn. 249; Cobb v. Foree, 38 Ill. App. 255; BRAUER v. SHAW, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387.

⁸¹ DUNMORE v. ALEXANDER, 9 Shaw & D. 190. Suppose, however, the letter containing the offer should be read, and an acceptance dispatched in good faith, before the letter containing the withdrawal is opened. It would seem, on principle, that in such a case the acceptance must be effectual.

⁸² DICKINSON v. DODDS, 2 Ch. Div. 463; COLEMAN v. APPLGARTH, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417.

of the offer. In case of an offer to sell specific property, actual knowledge of its sale to another would clearly show an intent to revoke, but it is doubtful whether information from a stranger that such a sale has been made, or that the proposer has changed his mind, would be sufficient, as it would scarcely be reasonable to require a man to believe and act on such statements. In the absence of sufficient notice or knowledge of a revocation, the offer, according to the better doctrine and the weight of authority, continues open and will be turned into a binding promise by its acceptance.⁸³ Some courts, however, seem to have held, contrary to reason and principle, that notice of withdrawal is not necessary.⁸⁴ Where the parties are dealing with each other at a distance by correspondence, it is the settled law, in these as in other cases, that the offer continues open until notice of its withdrawal is not only sent, but received by the party to whom it was made, and is turned into a binding promise if accepted before receipt of the notice.⁸⁵ Knowledge in these cases also may be equivalent to notice sent and received.

The case of an offer made to the public generally by publication

⁸³ *BOSTON & M. R. R. CO. v. BARTLETT*, 3 Cush. (Mass.) 224, 225; *GREAT NORTHERN R. CO. v. WITHAM*, L. R. 9 C. P. 16; *Eskridge v. Glover*, 5 Stew. & P. (Ala.) 264, 26 Am. Dec. 344; *Houghwout v. Boisaubin*, 18 N. J. Eq. 318; *HENTHORN v. FRAZER* [1892] 66 L. T. (N. S.) 439, 2 Ch. 27; *Cheney v. Cook*, 7 Wis. 413; *School Directors v. Trefethren*, 10 Ill. App. 127; *Paddock v. Davenport*, 107 N. C. 710, 12 S. E. 464; *Wall v. Railroad Co.*, 86 Wis. 48, 56 N. W. 367. And see *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. 389, 14 Am. St. Rep. 364. See, also, post, p. 119.

⁸⁴ *Tucker v. Woods*, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; *Bean v. Burbank*, 16 Me. 458, 33 Am. Dec. 681; *Gillespie v. Edmonston*, 11 Humph. (Tenn.) 553. And see *COOKE v. OXLEY*, 3 Term R. 653. This case has been very much criticised and disapproved in so far as it seems to hold that, where an offer gives a specified time within which it may be accepted, an acceptance within that time, without notice that the offer has been revoked, does not bind; that is to say, that notice of the revocation is not necessary. If the case was intended to go this far, it is not considered as authority in this country. *BOSTON & M. R. R. CO. v. BARTLETT*, 3 Cush. (Mass.) 224. Nor, it seems, is it followed, even in England, to such an extent as we have suggested. Indeed, a later English case says: "All that *COOKE v. OXLEY* affirms is that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. * * * The offer may be revoked before acceptance. If the offer is not retracted, it is in force as a continuing offer till the time of accepting or rejecting it has arrived." *STEVENSON v. McLEAN*, 5 Q. B. Div. 351. If the case of *COOKE v. OXLEY* merely decides that an offer, coupled with a promise to keep it open for a specified time, may be revoked, to the knowledge of the other party, before the time has expired, where there is no consideration for the promise to keep it open, it is in accord with the law in this country, and with the later decisions in England.

⁸⁵ *Hamilton v. Insurance Co.*, 5 Pa. 339; *Larmon v. Jordan*, 56 Ill. 204; *AYERILL v. HEDGE*, 12 Conn. 434; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409; ante, pp. 25-27.

stands on a different footing from an offer made directly to a definite person. Such an offer may be revoked in the manner in which it was made.⁸⁶

LAPSE OF OFFER.

24. An offer will lapse, and so be determined without express revocation, so that a subsequent acceptance will have no effect—

- (a) On the efflux of a time specified for acceptance, or of a reasonable time where no time is specified;**
- (b) On its rejection;**
- (c) On failure of the acceptance to comply with the terms of the offer, which is equivalent to rejection;**
- (d) On the death or insanity of either party before acceptance.**

An offer may lapse and be determined by the efflux of a specified time for acceptance. If a person should offer to sell goods "if the offer is accepted by" a certain day, an acceptance after that time would have no effect. After the specified time has passed without acceptance, the offer lapses, or is determined without any further action on the part of the proposer, and it is no longer open for acceptance.⁸⁷ If no time is specified, the offer is determined by the lapse of a reasonable time.⁸⁸

The rejection or refusal of an offer by the person to whom it is made causes the offer to lapse. In order that an acceptance may be effective after a refusal, the offer must have been renewed by the proposer.⁸⁹

So, also, a failure to comply with a condition of the offer as to the mode of acceptance, or an acceptance conditionally, or on terms varying from those offered, will cause the offer to lapse, for this is, in effect, a rejection of the offer.⁹⁰ Thus, where a person offered to

⁸⁶ *SHUEY v. UNITED STATES*, 92 U. S. 73, 23 L. Ed. 697.

⁸⁷ *Ante*, p. 31, and cases cited in notes 68, 69.

⁸⁸ *RAMSGATE HOTEL CO. v. MONTEFIORE*, 1 Exch. 109; *LORING v. CITY OF BOSTON*, 7 Mete. (Mass.) 409; *ante*, p. 31, and cases cited in notes 68, 69. Continuing offer. *Sherley v. Pechl*, 84 Wis. 46, 54 N. W. 267.

⁸⁹ *TINN v. HOFFMAN*, 29 Law T. (N. S.) 271; *HYDE v. WRENCH*, 3 Beav. 331; *Davis v. Parish*, Litt. Sel. Cas. (Ky.) 153, 12 Am. Dec. 287; *W. & H. M. Goulding v. Hammond*, 4 C. C. A. 533, 54 Fed. 639; *Sheffield Canal Co. v. Sheffield & R. Ry. Co.*, 3 Ry. Cas. 121, 132; *Arthur v. Gordon* (C. C.) 37 Fed. 558; *Richardson v. Lenhard*, 48 Kan. 629, 29 Pac. 1076.

⁹⁰ *HYDE v. WRENCH*, 3 Beav. 336; *First Nat. Bank v. Hall*, 101 U. S. 50, 25 L. Ed. 822; *MINNEAPOLIS & ST. L. RY. CO. v. ROLLING-MILL CO.*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376; *Carr v. Duval*, 14 Pet. 77, 10 L. Ed. 361; *Derrick v. Monette*, 73 Ala. 75; *Jenness v. Iron Co.*, 53 Me. 20; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Clay v. Ricketts*, 66 Iowa, 362, 23 N. W. 755; *Cornwells v. Krengel*, 41 Ill. 394; *Eggleson v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Iron Works v. Douglas*, 49 Ark. 355, 5 S. W. 585; *Northwestern Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557;

sell land at a certain sum, and the person to whom the offer was made replied that he would give a less sum, and afterwards, when this was refused, and when the proposer was no longer willing to adhere to his original proposal, sought to bind him by accepting at the sum first asked, it was held that the proposal to buy at a less sum than asked was a refusal of the offer, and a counter proposal, and that the original offer could not, after that, be turned into a promise by acceptance.⁹¹

The death⁹² or insanity⁹³ of either party before acceptance of an offer causes the offer to lapse. An acceptance communicated to the personal representatives of the proposer after his death cannot bind them; nor can the representatives of the person to whom an offer has been made, and who has since died, bind the proposer by accepting it on behalf of the estate. An offer, as we have said, is considered as continuing up to the time of acceptance, but, if one of the parties dies, then there is no one by whom or to whom, as the case may be, the offer can be considered as being made.⁹⁴ The fact that an acceptance is dispatched in ignorance of the proposer's death can make no difference. Since, however, an acceptance by mail takes effect at the moment of its dispatch, the death of the proposer before the receipt of the acceptance, but after it has been mailed, does not cause the offer to lapse, since, before his death, it has been turned into a binding promise by the acceptance.⁹⁵

So, also, the dissolution of a partnership after an offer has been made by the firm, and before its acceptance, with notice thereof to the person to whom the offer was made, revokes the offer;⁹⁶ and it would seem that dissolution of a firm to whom an offer is made, be-

First Nat. Bank v. Clark, 61 Md. 400, 48 Am. Rep. 114; Crabtree v. Opera-House Co. (C. C.) 39 Fed. 746; W. & H. M. Goulding v. Hammond, 4 C. C. A. 533, 54 Fed. 639.

⁹¹ HYDE v. WRENCH, 3 Beav. 336.

⁹² Wallace v. Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829; MACTIER'S ADM'RS v. FRITH, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; PRATT v. TRUSTEES OF BAPTIST SOC., 93 Ill. 475, 34 Am. Rep. 187; In re Holfenstein's Estate, 77 Pa. 328, 18 Am. Rep. 449; Frith v. Lawrence, 1 Paige (N. Y.) 434; Blades v. Free, 9 Barn. & C. 167; Campanari v. Woodburn, 15 C. B. 400; LEE v. GRIFFIN, 1 Best & S. 272; Aitkin v. Lang's Admr., 106 Ky. 652, 51 S. W. 154, 90 Am. St. Rep. 263; WERNER v. HUMPHREYS, 2 Man. & G. 853; Marr v. Shaw (C. C.) 51 Fed. 860.

⁹³ The Palo Alto, 2 Ware, 344, Fed. Cas. No. 10,700; BEACH v. FIRST M. E. CHURCH, 96 Ill. 177. It seems that knowledge of the insanity by the other party is essential. DREW v. NUNN, 4 Q. B. Div. 661; IMPERIAL LOAN CO. v. STONE [1892] 1 Q. B. 599.

⁹⁴ Frith v. Lawrence, supra; PRATT v. TRUSTEES, supra.

⁹⁵ MACTIER'S ADM'RS v. FRITH, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262.

⁹⁶ Goodspeed v. Plow Co., 45 Mich. 322, 7 N. W. 902.

fore acceptance, must necessarily cause the offer to lapse, as the party to whom the offer was made is no longer in existence.

OFFERS TO THE PUBLIC GENERALLY.

25. An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.

In order that an offer may result in a contract it need not be made to a definitely ascertained person. It may be made to any one of the public generally, or to any one of a class of persons, who may accept it. These offers are sometimes said to be made "to all the world," but this is not correct.⁹⁷ Take, for instance, the case of a proposal by way of advertisement of a reward for the rendering of certain services, addressed to the public at large, such as an advertisement for the return of lost property, or for the apprehension of persons who have committed a crime, or for certain information. This is an offer, to any one who shall accept it, of a promise for an act, and becomes a binding promise to pay the reward as soon as any individual renders the services.⁹⁸

Offers of this character are generally advertisements for such services as we have mentioned, but they are not limited to them.⁹⁹ Sellers

⁹⁷ See *SPENCER v. HARDING*, L. R. 5 C. P. 561.

⁹⁸ *Wentworth v. Day*, 3 Metc. (Mass.) 352, 37 Am. Dec. 145; *Besse v. Dyer*, 9 Allen (Mass.) 151, 85 Am. Dec. 747; *LORING v. CITY OF BOSTON*, 7 Metc. (Mass.) 409; *Wilson v. Guyton*, 8 Gill (Md.) 213; *Pierson v. Morch*, 82 N. Y. 503; *First Nat. Bank v. Hart*, 55 Ill. 62; *Montgomery County v. Robinson*, 85 Ill. 174; *Harson v. Pike*, 16 Ind. 140; *Goldsborough v. Cradie*, 28 Md. 477; *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634; *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1; *Thruston v. Thornton*, 1 Cush. (Mass.) 91; *Morse v. Bellows*, 7 N. H. 549, 563, 28 Am. Dec. 372; *Janvrin v. Town of Exeter*, 48 N. H. 83, 2 Am. Rep. 185; *Cummings v. Gann*, 52 Pa. 484; *Morrell v. Quarles*, 35 Ala. 544. As to the intention to become bound, see post, p. 41, note 112.

⁹⁹ *SEYMOUR v. ARMSTRONG*, 62 Kan. 720, 64 Pac. 612. A published time table is an offer by the railroad company to the public generally that, if they will apply for a ticket for carriage, they will be carried as stated in the time table, and the offer is accepted by each person who applies for a ticket. *Denton v. Great Northern R. Co.*, 5 El. & Bl. 860; *SEARS v. RAILROAD CO.*, 14 Allen (Mass.) 433, 92 Am. Dec. 780. The same doctrine has been applied in the case of bounties offered by towns, cities, or counties to any person who should enlist into the military service of the United States. *Crowell v. Hopkinton*, 45 N. H. 9. As to offers of premiums in horse races, see *Alvord v. Smith*, 63 Ind. 58. Offer by persons purchasing railroad on foreclosure and organizing new company to exchange new stock for old. *Schorestene v. Iselin*, 69 Hun. 259, 22 N. Y. Supp. 557. As to general letter of credit as being a general offer resulting in a promise to persons giving credit on the strength of it, see *Ex parte Asiatic Banking Corp.*, 2 Ch. App. 391.

of a medicinal remedy, who, to increase their sales, advertise that a certain sum will be paid to any person who buys and uses the remedy, and afterwards contracts the disease it is claimed to prevent, will become bound by contract obligation to any person who purchases and uses the remedy, and he may recover the sum promised if he contracts the disease.¹⁰⁰

Such a general offer may be made orally. Thus, where a person, whose wife was in a burning building, exclaimed to the bystanders generally that he would give a certain sum to any person who would bring out her body, and a man did so, it was held that he could recover the sum promised.¹⁰¹

Acceptance and Revocation.

Offers of this character cannot result in contract obligation until they are accepted by an ascertained person by performing the services. Before the services are rendered, there is merely an offer, which may be revoked.¹⁰² An acceptance by performance of the services after the offer has been withdrawn does not bind the proposer,¹⁰³ and it even seems that ignorance of the withdrawal makes no difference, if the withdrawal was as publicly made as the offer.¹⁰⁴ According to the weight of authority, the offer remains open for acceptance until it is actually withdrawn or revoked.¹⁰⁵

Performance of Services in Ignorance of Offer—Motive.

Suppose that the person performing the service does not know of the offer, or does not realize all its terms, does he thereby accept the offer and acquire a right to the reward? In a leading English case a reward had been offered by the defendant for information which was supplied by the plaintiff, but not with a view to the reward. The

¹⁰⁰ *CARLILL v. CARBOLIC SMOKE-BALL CO.* [1892] 2 Q. B. 484, 4 Rep. 176; *Id.* [1893] 1 Q. B. 256. So, where a person invites architects to submit designs, stating that all who submit plans shall receive a certain sum, and that the one whose plans are the best shall be engaged as architect, he becomes bound to pay the sum specified to all who submit plans, and, if he adjudges one of the plans the best, to make that architect the architect of the building. *Walsh v. Association*, 16 Mo. App. 502; *Id.*, 90 Mo. 459, 2 S. W. 842.

¹⁰¹ *REIF v. PAIGE*, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731. And see *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1.

¹⁰² *Hanson v. Pike*, 16 Ind. 140; *Freeman v. City of Boston*, 5 Metc. (Mass.) 56; *Cummings v. Gann*, 52 Pa. 484.

¹⁰³ *SHUEY v. U. S.*, 92 U. S. 73, 23 L. Ed. 697; *BIGGERS v. OWEN*, 79 Ga. 658, 5 S. E. 193.

¹⁰⁴ *SHUEY v. U. S.*, 92 U. S. 73, 23 L. Ed. 697.

¹⁰⁵ *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634; *In re Kelly*, 39 Conn. 159. In Massachusetts it is held that the offer, like other offers, lapses after the expiration of a reasonable time. *LORING v. CITY OF BOSTON*, 7 Metc. (Mass.) 409.

report of the case does not show that the plaintiff was unaware of the offer; the only point which seems to have been raised being that the reward was not the motive which induced the plaintiff to supply the information. The court held that the motive was immaterial, and that "there was a contract with the person who performed the condition mentioned in the advertisement."¹⁰⁶

In this country the authorities are conflicting. Some courts have held that the reward cannot be recovered where the person performing the services did so in ignorance of the offer. "To the existence of a contract," it was said in a New York case, "there must be mutual assent, or, in another form, offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that, there is no contract. How, then, can there be consent or assent to that of which the party has never heard?"¹⁰⁷ Other courts have held that ignorance of the offer does not prevent the person performing the services from recovering.¹⁰⁸ It has even been held, contrary to the English case above mentioned, that the motive in performing the services is material, and that there must be an intent to claim the reward, as well as knowledge that it is offered.¹⁰⁹

OFFER AS REFERRING TO LEGAL RELATIONS.

26. The offer must be intended to create, and be capable of creating, legal relations.

Intention to Create Legal Relations.

In order that an offer or proposal may be turned into a binding contract by acceptance, it must be made in contemplation of legal consequences. A mere statement of intention, for instance, made in the course of conversation, will not result in a binding promise, though acted upon by the party to whom it was made.¹¹⁰ Thus,

¹⁰⁶ WILLIAMS v. CARWARDINE, 4 Barn. & Adol. 621.

¹⁰⁷ FITCH v. SNEDAKER, 38 N. Y. 248, 97 Am. Dec. 791; Howland v. Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Marvin v. Treat, 37 Conn. 96, 9 Am. Rep. 307; Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; WILLIAMS v. RAILWAY CO., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

¹⁰⁸ DAWKINS v. SAPPINGTON, 26 Ind. 199; Russell v. Stewart, 44 Vt. 170; Auditor v. Ballard, 9 Bush. (Ky.) 572, 15 Am. Rep. 728; Eagle v. Smith, 4 Houst. (Del.) 293; Crawshaw v. City of Roxbury, 7 Gray (Mass.) 377; Everman v. Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

¹⁰⁹ HEWITT v. ANDERSON, 56 Cal. 476, 38 Am. Rep. 65.

¹¹⁰ Week v. Tibold, Rolle, Abr. 6; Randall v. Morgan, 12 Ves. 67; Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Stagg v. Compton, 81 Ind. 171; Erwin v. Erwin, 25 Ala. 236; Carson v. Lucas, 13 B. Mon. (Ky.) 213; Henderson Bridge Co. v. McGrath, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934; KIRKSEY v. KIRKSEY, 8 Ala. 131; Lakeside Land Co. v. Dromgoole, 89 Ala. 505, 7 South. 444; Thruston v. Thornton, 1 Cush. (Mass.) 89; Higgins

where a father said to a man that he would give a certain sum to him who married his daughter with his consent, and the man married her, and sued for the money, it was held that he could not recover, as it was not reasonable that a man "should be bound by general words spoken to excite suitors."¹¹¹ Nor will services rendered for another and accepted by him place him under a contractual obligation to pay for them, where payment therefor was not expected nor intended.¹¹²

On the same footing stand engagements of pleasure, or agreements which, from their nature, do not admit of being regarded as business transactions.¹¹³

Same—Jest.

Transactions intended as a joke or jest cannot result in a contract, for the reason that there is no intention to contract; there is no contemplation of legal consequences.¹¹⁴

Same—Invitations to Deal.

Offers which, by acceptance, may be turned into binding promises, must be distinguished from offers which merely amount to invitations to deal. Illustrations of this arise where merchants send out circulars offering goods for sale on certain terms, not intending the circular as an offer to become binding on acceptance, but merely as an invitation to persons to enter into negotiations;¹¹⁵ or where a per-

v. Lessig, 49 Ill. App. 459. Statements by a married child that she intends to pay her parents for support, made to third persons, result in no contract on her part. Perkins v. Westcoat, 3 Colo. App. 338, 33 Pac. 139. The rule above stated applies to offers of reward made to the public generally. Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 296; Higgins v. Lessig, 49 Ill. App. 459. See, also, Ulrich v. Arnold, 120 Pa. 170, 13 Atl. 831.

¹¹¹ Week v. Tibold, *supra*. And see Randall v. Morgan, *supra*.

¹¹² The fact that services are rendered does not create a liability on the part of the person for whom they are rendered, even though done at his request, where the circumstances are such as to repel the inference that compensation was intended; and, when performed merely from kindly or charitable motives, the law will not imply a promise to pay for them. Cicotte v. Church of St. Anne, 60 Mich. 552, 27 N. W. 682. And see Covell v. Turner, 74 Mich. 408, 41 N. W. 1091; Gross v. Cadwell, 4 Wash. 670, 30 Pac. 1052; Sullivan v. Latimer, 38 S. C. 158, 17 S. E. 701; Everitt v. Walker, 109 N. C. 129, 13 S. E. 860; Collyer v. Collyer, 113 N. Y. 442, 21 N. E. 114. See, also, ante, p. 17, and cases cited.

¹¹³ Anson, Cont. (4th Ed.) 19; ante, p. 4.

¹¹⁴ McCLURG v. TERRY, 21 N. J. Eq. 225; Armstrong v. McGhee, Add. (Pa.) 261; KELLER v. HOLDERMAN, 11 Mich. 248, 83 Am. Dec. 737; Bruce v. Bishop, 43 Vt. 161. Marriage ceremony performed in jest, but by a person duly authorized. McCLURG v. TERRY, *supra*.

¹¹⁵ SPENCER v. HARDING, L. R. 5 C. P. 561; MOULTON v. KERSHAW, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516; LINCOLN v. PRESERVING CO., 132 Mass. 129; Knight v. Cooley, 34 Iowa, 218; Toppliff v. McKendree, 88

son, wishing to have work done, or to buy goods, advertises for proposals;¹¹⁶ or where a person advertises that he will sell goods at auction.¹¹⁷ The circulars of the merchant, the advertisement for proposals, and the advertisement of the auction sale, are mere declarations of intention. Legal consequences are not directly contemplated, and no contract relation arises with persons who may send an order for goods, or make bids, or attend the auction. The rule applies whenever it is clear that a proposition was intended merely as an invitation to deal, and not as an offer to become binding on acceptance.¹¹⁸

Same—Incomplete Negotiations.

Similar to these cases are those in which the parties are carrying on negotiations, and have not yet come to an agreement. So long as the negotiations are incomplete, there is no contract.¹¹⁹ "An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled."¹²⁰

Mich. 148, 50 N. W. 109; Allen v. Kirwan, 159 Pa. 612, 28 Atl. 495; Smith v. Weaver, 90 Ill. 392; Zeltner v. Irwin, 25 App. Div. 228, 49 N. Y. Supp. 337.

¹¹⁶ Howard v. Industrial School, 78 Me. 230, 3 Atl. 657; Leskie v. Haselstine, 155 Pa. 98, 25 Atl. 886; Topping v. Swords, 1 E. D. Smith (N. Y.) 609.

¹¹⁷ Harris v. Nickerson, L. R. 8 Q. B. 286.

¹¹⁸ In MOULTON v. KERSHAW, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516, the defendants wrote plaintiff: "We are authorized to offer Michigan fine salt, in full carload lots of 80 to 95 bbls., delivered at your city, at 85c. per bbl. * * * Shall be pleased to receive your order,"—and the plaintiff at once replied, ordering 2,000 barrels, but the defendants refused to fill the order. The court held that defendants' letter was a simple notice that they were in a condition to supply salt for the price named, and an invitation to deal with them, and not an offer which plaintiff could change into a binding promise by his order. See, also, Beaupré v. Telegraph Co., 21 Minn. 155; Kinghorne v. Telegraph Co., U. C. 18 Q. B. 60; Lyman v. Robinson, 14 Allen (Mass.) 254; Smith v. Gowdy, 8 Allen (Mass.) 566; SCHENECTADY STOVE CO. v. HOLBROOK, 101 N. Y. 45, 4 N. E. 4; HARVEY v. FACEY, 1 Rep. 428; Id. [1893] App. Cas. 552; Patton v. Arney, 95 Iowa, 664, 64 N. W. 635. Cf. Keller v. Ybarru, 3 Cal. 147; College Mill Co. v. Fidler (Tenn. Ch.) 58 S. W. 382.

¹¹⁹ Lyman v. Robinson, 14 Allen (Mass.) 242; SCHENECTADY STOVE CO. v. HOLBROOK, 101 N. Y. 45, 4 N. E. 4; Bean v. Clark (C. C.) 30 Fed. 225; Templeton v. Wile (City Ct. N. Y.) 3 N. Y. Supp. 9; Commercial Tel. Co. v. Smith, 47 Hun (N. Y.) 494; Morris v. Brightman, 143 Mass. 149, 9 N. E. 512; Wardell v. Williams, 62 Mich. 50, 28 N. W. 796, 4 Am. St. Rep. 814; Shaw v. Glass Works, 52 N. J. Law, 7, 18 Atl. 696; Whiteford v. Hitchcock, 74 Mich. 208, 41 N. W. 898; Gates v. Nelles, 62 Mich. 444, 29 N. W. 73. And see ante, p. 28.

¹²⁰ Ridgway v. Wharton, 6 Ill. L. Cas. 268. And see SHEPARD v. CAR-

So, also, if the parties come to an agreement as to terms, but with the intention that their agreement is to be reduced to writing, and that they are not to be bound until this is done, there is no contract until the writing is drawn up and assented to by both as their agreement. If they come to a final agreement as to terms, it may, indeed, bind them, though they intend to reduce the terms into writing for the purpose of becoming bound in a more formal manner, or of preserving a memorial of the terms, or for any purpose other than that of making the writing exclusively their agreement.¹²¹ The question is whether they intend legal consequences before the formal written evidence of their agreement is executed. If they do not, there is no contract until this is done; but, if they do intend to be bound without regard to the writing, there is a contract.¹²² The question is one of fact; but the circumstance that they do intend a subsequent writing to be drawn up is said to be strong evidence that they do not intend to be bound by the preliminary agreement.¹²³

Offer as Capable of Creating Legal Relations—Definiteness and Certainty.

An offer or proposal must be capable of creating legal relations, or no contract can result. An agreement cannot create an obligation, or legal relations, unless it is capable of being enforced by the courts; and, as we have seen, creation of an obligation is essential.

It follows that, to result in a contract, the agreement must be sufficiently definite and certain to enable the court to collect from it the full intention of the parties, for the court cannot make an agreement for them.¹²⁴ The parties may have come to a real agreement, but

PENTER, 54 Minn. 153, 55 N. W. 906; Sibley v. Felton, 156 Mass. 273, 31 N. E. 10; Strobbridge Lithographing Co. v. Randall, 73 Fed. 619, 19 C. C. A. 611.

¹²¹ Leake, Cont. 98; Ridgway v. Wharton, 6 H. L. Cas. 268; Green v. Cole (Mo. Sup.) 24 S. W. 1058; Lewis v. Brass, L. R. 3 Q. B. Div. 667; CROSSLEY v. MAYCOCK, L. R. 18 Eq. 180; Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757. And see ante. p. 28.

¹²² Winn v. Bull, 2 Ch. Div. 29; Fowle v. Freeman, 9 Ves. 351; Gibbins v. Asylum District, 11 Beav. 1; Heyworth v. Knight, 17 C. B. (N. S.) 298; Rosister v. Miller, 5 Ch. Div. 648; Commercial Tel. Co. v. Smith, 47 Hun (N. Y.) 494; Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869; Hodges v. Sublett, 91 Ala. 588, 8 South. 800; Lawrence v. Railroad Co., 84 Wis. 427, 54 N. W. 797; Mississippi & D. S. S. Co. v. Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545; EDGE MOORE BRIDGE WORKS v. BRISTOL COUNTY, 170 Mass. 528, 49 N. E. 918. See, also, ante, p. 28.

¹²³ Leake, Cont. 98; Ridgway v. Wharton, 6 H. L. Cas. 268.

¹²⁴ Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Marble v. Oil Co., 169 Mass. 553, 48 N. E. 785; In re Purves' Estate, 196 Pa. 438, 46 Atl. 369; Faulkner v. Drug Co., 117 Iowa, 120, 90 N. W. 585. Uncertainty as to price or terms of payment on sale of land. George v. Conbaim, 38 Minn. 338, 37 N. W. 791; Smoyer v. Roth (Pa. Sup.) 13 Atl. 191; Everett v. Dilley, 39 Kan. 73, 17 Pac. 661.

they must take the chances of not having made it intelligible.¹²⁵ It is generally said that the contract or the agreement or the promise must be certain, but it is the same thing to say that the offer must be certain. An uncertain offer is sometimes apparently remedied by its acceptance, but this is not really so, for an acceptance must be identical with the terms of the offer. If it varies from them, as it must in order to remedy uncertainty in the offer, it is not an acceptance, but a counter offer.

The rule, then, is that the offer must not be so indefinite as to make it impossible for the court to say what was promised.¹²⁶ Thus, where a person bought a horse, and promised that, if it was lucky to him, he would give a certain additional sum, "or the buying of another horse," it was held that the promise was too loose and vague to be considered in a court of law.¹²⁷ And so, where a person agrees to perform services for such remuneration as shall be deemed right, or for such wages as his employer shall deem right or reasonable, or for "good wages," it is held that there is not a sufficiently definite promise of payment to be capable of enforcement.¹²⁸

Same—"Id Certum est Quod Certum Reddi Potest."

This rule, however, is subject to the maxim, "*Id certum est quod certum reddi potest.*"¹²⁹ For this reason an offer to sell goods need not necessarily specify the amount that may be ordered, but may leave

¹²⁵ Pol. Cont. 42.

¹²⁶ *Guthing v. Lynn*, 2 Barn. & Adol. 232; *SHERMAN v. KITSMILLER*, 17 Serg. & R. (Pa.) 45; *Freed v. Mills*, 120 Ind. 27, 22 N. E. 86; *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371; *Erwin v. Erwin*, 25 Ala. 236.

¹²⁷ *Guthing v. Lynn*, *supra*.

¹²⁸ *TAYLOR v. BREWER*, 1 Maule & S. 290; *Roberts v. Smith*, 4 Hurl. & N. 315; *Fairplay School Tp. v. O'Neal*, 127 Ind. 95, 26 N. E. 686. But see *Caldwell v. School Dist. (C. C.)* 55 Fed. 372; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934. The following promises have been held void for uncertainty: To give a person a house, and provide for her at promisor's death, if she would live with him. *Wall's Appeal*, 111 Pa. 460, 5 Atl. 220, 56 Am. Rep. 288. To let a person retain possession of property on his paying the same rent the promisor "might be able to obtain from other parties." *Gelston v. Sigmund*, 27 Md. 334. That a person should have preference in renting of property so long as it should be rented for store. *Delashmutt v. Thomas*, 45 Md. 140. To take a house "if put into thorough repair," and if the drawing rooms were "handsomely decorated, according to the present style." *Taylor v. Portington*, 7 De Gex. M. G. 328. To sell land, reserving "the necessary land for making a railway." *Pearee v. Watts*, 20 Eq. 492. Agreement by which a person is to work in a mine, and receive a certain sum per ton on all ore produced, as long as the mine can be made to pay. *Davie v. Mining Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357. Promise to take note for certain sum, without specifying terms. *Van Schaick v. Van Buren*, 70 Hun, 575, 24 N. Y. Supp. 306.

¹²⁹ *Parker v. Pettit*, 43 N. J. Law, 512; *Miller v. Kendig*, 55 Iowa, 174, 7 N. W. 500; *Thompson v. Stevens*, 71 Pa. 161.

it for the person to whom the offer is made to specify the amount in his acceptance. If this is the intention of the parties, the acceptance concludes the contract, and does not amount to a counter proposal necessary to be accepted.¹³⁰ The intention is important here, in order to distinguish these cases from those in which it is held that the acceptance does not conclude a contract because the proposer did not intend to affect his legal relations, but merely to invite negotiations.¹³¹ For the same reason it is not necessary, in offering to sell goods, to name the price, for, if no price is specified, a reasonable price will be implied. Other illustrations of the application of this rule are given below.¹³²

Same—Capacity of Parties—Form—Consideration—Legality of Object.

In order that an offer be capable of creating legal relations, (a) it must be made by and to a party capable of contracting; (b) it must be

¹³⁰ *Dambmann v. Lorentz*, 70 Md. 380, 17 Atl. 389, 14 Am. St. Rep. 364.

¹³¹ *Ante*, p. 41.

¹³² The following contracts have been held sufficiently certain: Contract making extent of promisor's liability such as may be imposed by a certain statute. *Town of Hamden v. Merwin*, 54 Conn. 418, 8 Atl. 670. A promise to buy all the supplies of a certain kind the promisor may need. *Lenz v. Brown*, 41 Wis. 172; *Levey v. Railroad Co.*, 4 Misc. Rep. 415, 24 N. Y. Supp. 124; *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85, 43 N. E. 775, 31 L. R. A. 529; *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227. See post, p. 120. A promise to sell all the future produce of a certain vineyard the promisee may wish. *Keller v. Ybarru*, 3 Cal. 147. And see *Bates v. Childers*, 5 N. M. 62, 20 Pac. 164; *Booske v. Ice Co.*, 24 Fla. 550, 5 South. 247; *McCall Co. v. Icks*, 107 Wis. 232, 83 N. W. 300. Definiteness as to territory in which party shall have exclusive right to sell goods,—“in D. and the territory tributary thereto.” *Kaufman v. Manufacturing Co.*, 78 Iowa, 679, 43 N. W. 612, 16 Am. St. Rep. 462. Cf. *Hauser v. Harding*, 126 N. C. 295, 35 S. E. 586. Describing a party as “Mr. Lee” does not render the contract uncertain, as it may be explained by parol. *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800. Promise to erect “a good steam saw-mill.” *Fraley v. Bentley*, 1 Dak. 25, 46 N. W. 506. Sale of a stock of merchandise, “all soiled or damaged goods at valuation.” *Sergeant v. Dwyer*, 44 Minn. 309, 46 N. W. 444. Promise to employ a person “for 12 months commencing not later than the 15th of July, possibly the 1st of July, the date to be fixed by” the promisee. *Troy Fertilizer Co. v. Logan*, 96 Ala. 619, 12 South. 712. Agreement to furnish a person with “steady and permanent employment.” *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289. See, also, *Cornig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488. Agreement to furnish a certain number of car loads of lumber, a car load varying from 35,000 to 60,000 feet. *Indianapolis Cabinet Co. v. Herrmann*, 7 Ind. App. 462, 34 N. E. 579. Sale of nine walnut trees standing on the vendor's land, marked when the sale is made. *Carpenter v. Medford*, 99 N. C. 495, 6 S. E. 785, 6 Am. St. Rep. 535. Contract with provision that it should be renewed for further term if plaintiff succeeded in doing such a business as defendant might “reasonably expect.” *Worthington v. Beeman*, 91 Fed. 232, 33 C. C. A. 475.

made in the form prescribed by law ; (c) If it is to be accepted by the giving of a promise, it must be a consideration for the promise ; and, if it is an offer of a promise, the act, forbearance, or promise asked in return must be a consideration ; and (d) the act or forbearance done or contemplated must be lawful. These matters will be discussed in subsequent chapters, dealing with the capacity of parties, form, consideration, and legality of the object of contracts.

CHAPTER III.

CLASSIFICATION OF CONTRACTS—CONTRACTS UNDER SEAL AND CONTRACTS OF RECORD.

- 27. Classification of Contracts.
- 28. Contracts of Record.
- 29. Contracts Under Seal.
- 30-32. How Contracts Under Seal are Made.
- 33. Characteristics of Contract Under Seal.
- 34. Necessity for Contract Under Seal.

In the last chapter we dealt with the mode in which the common intention of the parties must be communicated, and showed how it must refer to legal relations, in order that it may form the basis of a contract. It is not enough, however, that the common intention of the parties be communicated in the mode we have described, and that the parties intend legal consequences. Most systems of law require some further evidence of the intention of the parties, without which mere intention will not avail to create an obligation between them. In our law this evidence is supplied by form and consideration. Sometimes one, sometimes the other, and sometimes both are required to render a contract enforceable. By "form" is meant some peculiar solemnity attaching to the expression of agreement; by "consideration," some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee, or some detriment suffered by the promisee.¹

CLASSIFICATION OF CONTRACTS.

27. Contracts are divided into—

- (a) Contracts dependent for their validity upon their form alone, or strictly formal contracts. These are:

- (1) Contracts of record.
- (2) Contracts under seal.

- (b) Simple or parol contracts, which may be divided into—

- (1) Such as are dependent for their validity both on their form and on the presence of consideration. These are contracts not under seal, nor of record, but which are required by law to be in writing, either with or without a particular form.
- (2) Such as are dependent for their validity upon the presence of consideration alone, no form at all being required.

¹ Anson, Cont. (8th Ed.) 43. The student will do well to read in this connection what Anson says in regard to the history and development of the doctrines of form and consideration. See Anson, Cont. (8th Ed.) pp. 43-48.

Sir William Anson divides contracts into (a) formal contracts, or contracts dependent for their validity upon their form, under which he classes (1) contracts of record, and (2) contracts under seal; and (b) simple contracts, or contracts which he declares to be dependent for their validity upon the presence of consideration, and under which he classes (1) contracts required by law to be in some form other than under seal, and (2) contracts for which no form is required. This classification, however, has been objected to on the ground "that a contract which the law requires to be in writing, such as a promissory note or a guaranty, is as much dependent for its validity upon the form, and is as truly a formal contract, as one under seal. The latter requires only a writing and a seal, the former a writing and a consideration; but the writing in this instance is just as essential as is the consideration."²

There are two classes of contract which at common law depend for their validity upon their form alone. These are contracts under seal and contracts of record. They are strictly formal contracts. All other contracts are called "simple" or "parol" contracts, and depend for their validity upon the presence of consideration. Some of these contracts are also required to be in writing, as in the case of bills of exchange and promissory notes, in the case of which a particular form is also required, and contracts within the statute of frauds; so that they depend for their validity upon their form as well as upon the presence of consideration. Simple contracts, not required by the common law or by statute to be in writing, may be made by word of mouth, or by conduct, as we have explained in treating of offer and acceptance. They need no particular form, but depend for their validity upon the presence of consideration alone.

We have, then, three classes of contracts: (a) Contracts of record; (b) contracts under seal; and (c) simple or parol contracts; or, if we classify according as a contract depends for its validity upon form or consideration, or both, we have: (a) Contracts dependent for their validity upon their form alone, or (1) contracts of record, and (2) contracts under seal; (b) simple or parol contracts, which are dependent for their validity both on their form and on the presence of consideration, or contracts required to be in writing, but not under seal nor of record; and (c) simple or parol contracts, for which no form at all is required, and which depend for their validity upon the presence of consideration alone.

All of these contracts, except contracts under seal and contracts of record, are called "simple" or "parol" contracts. The word "parol" strictly means "by word of mouth," and excludes writing; but the term is applied to all simple contracts, whether they are merely oral

² Brantly, Cont. 33.

or required to be in writing. They all require consideration, the only distinction being in the fact that some must be in writing.³

We shall now deal with the contracts of record and contracts under seal, and in following chapters with those forms which are superimposed upon simple contracts, and with consideration, the requisite common to all simple contracts.

CONTRACTS OF RECORD.

28. The obligations which are styled "contracts of record" are:

- (a) **Judgments of courts of record, whether entered by consent or rendered in invitum. In the latter case, however, the obligation is quasi contractual, and not contractual.**
- (b) **Recognizances, which are obligations, entered into before a court of record, to do or forbear from doing a certain thing under a penalty.**

Judgments.

A judgment of a court of record awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. The judgment is entered upon the record of the court, and for this reason is called a "formal" contract. This obligation may come into existence as the final result of litigation when the court pronounces judgment, or it may be created by agreement between the parties before litigation has commenced, or during its continuance. In the latter case there is agreement, and the agreement results in obligation. The judgment, therefore, has the features of contract. In the former, however, there is no consent on the part of the person bound, and the obligation, therefore, is not contractual, but quasi contractual.⁴ Where the judgment is entered by agreement, the obligation results from a contract for the making of which certain formalities are required,—either a warrant of attorney, by which one party gives authority to the other to enter judgment upon terms settled, or a *cognovit actionem*, by which the one party acknowledges the right of the other in respect of the pending dispute, and then gives a similar authority.⁵

Characteristics of Judgment—Estoppel.

The characteristics of an obligation of this nature are these:

(1) Its terms, so long as it has not been regularly vacated or reversed, admit of no dispute, but are conclusively proved by a production of the record. The judgment, however, to be so conclusive,

³ RANN v. HUGHES, 7 Term R. 350; Whitehill v. Wilson, 3 Pen. & W. (Pa.) 405, 24 Am. Dec. 326; Perrine v. Cheeseman, 11 N. J. Law, 174; Stabler v. Cowman, 7 Gill & J. (Md.) 284. See post, p. 110.

⁴ Ante, p. 8; post, p. 530.

⁵ See Leake, Cont. 89-95.

must be valid. It must have been rendered by a court having jurisdiction of the subject-matter and of the parties, and must have been properly entered of record.⁶

Same—Merger—Res Judicata.

(2) As soon as it is created, the previously existing rights with which it deals merge or are extinguished in it. For instance, where a person sues another for breach of contract, or for a civil injury, and a judgment is entered, either by consent or after trial, neither party has any further rights in respect of the cause of action. The judgment conclusively settles their rights, and the matter is said to be *res judicata*.⁷ Difficulties arise in applying the doctrine, but it would be beyond the scope of a book on contracts to go into the subject.

Same—Remedies of Creditor.

(3) The judgment creditor, or person in whose favor the judgment is entered, has certain advantages which an ordinary creditor does not possess. He has a double remedy for his debt. He can take out execution on the judgment, and so obtain directly the sum awarded, and he can also bring an action on the judgment for nonfulfillment of the obligation.⁸

Recognizance.

A recognizance is an obligation of record entered into generally, but not necessarily, in a criminal case, before some court of record or magistrate duly authorized, with condition to do some particular act; as, for instance, to appear at court as a witness, or for trial, to keep the peace, or to pay a debt.⁹

⁶ Vooght v. Winch, 2 Barn. & Ald. 662; The Rio Grande v. Otis, 23 Wall. 458, 23 L. Ed. 158; Osage City Bank v. Jones, 51 Kan. 379, 32 Pac. 1096; Le Grange's Lessee v. Ward, 11 Ohio, 258; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Burwell v. Burgwyn, 105 N. C. 498, 10 S. E. 1099; Suber v. Chandler, 36 S. C. 344, 15 S. E. 426; Junkans v. Bergin, 64 Cal. 203, 30 Pac. 627; Strong v. Lawrence, 58 Iowa, 55, 12 N. W. 74; Hollister v. Abbott, 31 N. H. 442, 61 Am. Dec. 342; post, p. 493.

⁷ Smith v. Nichols, 5 Bing. N. C., at page 220; Harrington v. Harrington, 154 Mass. 517, 28 N. E. 903; Todd v. Stewart, 9 Q. B. 759; Oregonian Ry. Co. v. Navigation Co. (C. C.) 27 Fed. 277; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Hill v. Morse, 61 Me. 541; post, p. 478.

⁸ Jones v. Williams, 13 Mees. & W. 628.

⁹ Black, Law Dict. tit. "Recognizance;" 2 Bl. Comm. 341.

CONTRACTS UNDER SEAL.

29. Contracts under seal, otherwise called "deeds" or "specialties," derive their validity, at common law, from their form alone, and not from the fact of agreement or consideration.

It is often said that the seal imports a consideration, but, as we shall see, this is incorrect. At common law the question of consideration is altogether immaterial. The form alone gives the contract its validity.¹⁰

All contracts under seal are called "deeds" or "specialties." We generally use the term "deed" as applying to conveyances of land, but it applies as well to all contracts under seal. Particular contracts under seal, deeds, or specialties are: (1) Grants or conveyances of land, in which the parties are called respectively "grantor" and "grantee;" (2) bonds, which are obligations conditioned upon the payment of money, or the doing or forbearance from doing some act, the parties to a bond being called respectively "obligor" and "obligee;" and (3) covenants, which are agreements between two or more persons, entered into by deed,—that is, under seal,—whereby one or more of them promises the other or others the performance or nonperformance of certain acts, or that a given state of things does or shall or does not or shall not exist, the parties being called respectively "covenantor" and "covenantee."

HOW CONTRACTS UNDER SEAL ARE MADE.

30. A deed must be in writing, and must be sealed and delivered, and possibly signed.

31. It takes effect from the date of its delivery.

32. ESCROW—A deed may be delivered to a third person to be delivered to the other party to it on the performance of a condition, and in such case takes effect, on performance of the condition, from the date of the original delivery.

A deed must be in writing or printed on paper or parchment.¹¹

It is often said to be executed, or made conclusive as between the parties, by being "signed, sealed, and delivered." At common law

¹⁰ Leake, Cont. 76.

¹¹ "A deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. * * * A deed cannot be written upon wood, leather, cloth, or the like, but only upon parchment or paper, for the writing upon them can be least vitiated, altered, or corrupted." Shep. Touch. 50; Co. Litt. 35b. For the reason why a deed may not be written on

there seems to be some doubt whether signature to a deed is necessary,¹² but it is, to say the least, safer to sign. That, however, which identifies a party to a deed with its execution is the presence of his seal; that which makes it operative, so far as he is concerned, is the fact of its delivery by him.¹³

The Seal.

There cannot be a deed or specialty without a seal.¹⁴

A seal is said by Lord Coke to be wax, with an impression,¹⁵ and no doubt anciently wax was the only substance used; but it is no longer essential. The impression may be made on a wafer attached to the instrument, or any other substance sufficiently tenacious to adhere, and capable of receiving an impression.¹⁶ It is therefore held sufficient if the impression is made on the paper itself on which the instrument is written. It need not be on a separate substance attached to the instrument.¹⁷

Some of the states have passed statutes allowing a scroll or scrawl made with the pen to be used in the place of a seal,¹⁸ and some courts have held, independent of statute, that a scroll is sufficient.¹⁹

wood, see Pol. Cont. 156. It may well be doubted whether the old rule requiring paper or parchment exclusively would be strictly followed to-day.

¹² Leake, Cont. 76; Cooch v. Goodman, 2 Q. B. 597; CROMWELL v. GRUNSDEN, 2 Salk. 462; Jeffery v. Underwood, 1 Pike (Ark.) 108.

¹³ Anson, Cont. (4th Ed.) 46.

¹⁴ State v. Thompson, 49 Mo. 188; Vance v. Funk, 2 Scam. (Ill.) 263; Chilton v. People, 66 Ill. 501; Stabler v. Cowman, 7 Gill & J. (Md.) 284; Boothbay v. Giles, 68 Me. 160; Corbin v. Laswell, 48 Mo. App. 626. Where, however, a seal is omitted by mistake, a court of equity will reform the instrument by supplying one, or will restrain the setting up of the want of one to defeat a recovery at law. Inhabitants of Bernards Tp. v. Stebbins, 109 U. S. 341, 3 Sup. Ct. 252, 27 L. Ed. 956; Wadsworth v. Wendell, 5 Johns. Ch. (N. Y.) 224; Town of Rutland v. Page, 24 Vt. 181; Inhabitants of Town of Montville v. Houghton, 7 Conn. 543; Sullivan v. Latimer, 38 S. C. 417, 17 S. E. 221. The matter appearing on an instrument must have been intended as a seal. The fact that it appears to be a seal, if it was not so intended, does not make the instrument a specialty. Clement v. Gunhouse, 5 Esp. 83; Blackwell v. Hamilton, 47 Ala. 470. As to presumption that there was a seal on an ancient deed on which no seal appears, see Reusens v. Staples (C. C.) 52 Fed. 91.

¹⁵ 3 Coke, Inst. 169.

¹⁶ 4 Kent, Comm. 452; WARREN v. LYNCH, 5 Johns. (N. Y.) 239; Tasker v. Bartlett, 5 Cush. (Mass.) 359; Beardsley v. Knight, 4 Vt. 471.

¹⁷ PILLOW v. ROBERTS, 13 How. 472, 14 L. Ed. 228; Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254; Hendee v. Pinkerton, 14 Allen (Mass.) 381.

¹⁸ Such is the case in California, Connecticut, Florida, Indiana, Illinois, Michigan, Minnesota, Missouri, New Jersey, New Mexico, Oregon, Virginia, West Virginia, and Wisconsin, and probably in other states.

¹⁹ Hacker's Appeal, 121 Pa. 192, 15 Atl. 500, 1 L. R. A. 861; Lee v. Adkins, 1 Minor (Ala.) 187; Bertrand v. Byrd, 4 Ark. 195; Hastings v. Vaughn, 5 Cal. 315; Trasher v. Everhart, 3 Gill & J. (Md.) 234; Underwood v. Dollins,

At common law, however, this is not permissible; there must be an impression.²⁰

At common law the mere affixing of the seal makes the instrument a contract under seal, but it has been held that, where a scroll is used, there must be some recital in the body of the instrument recognizing it as a seal.²¹ The authorities on this point are not in accord.²²

One seal may do for any number of parties signing a deed if each one adopts it as his own, but it is always safer to have a seal for each signature.²³

Delivery.

To render an instrument under seal a valid and binding contract, it must be delivered.²⁴ Delivery may be effected either by actually handing the instrument to the other party himself,²⁵ or to a stranger

47 Mo. 259; *Groner v. Smith*, 49 Mo. 318. Whether a mark or character shall be held to be a seal depends on the intention of the executant as shown by the paper. *JACKSONVILLE, M. P. RY. & NAV. CO. v. HOOPER*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515.

²⁰ *WARREN v. LYNCH*, supra; *Hendee v. Pinkerton*, supra; *Bates v. Boston & N. Y. C. R. Co.*, 10 Allen (Mass.) 251; *Perrine v. Cheeseman*, 11 N. J. Law. 174, 19 Am. Dec. 388.

²¹ *Cromwell v. Tate's Ex'r*, 7 Leigh (Va.) 301; *Lee v. Adkins*, 1 Minor (Ala.) 187; *Glasscock v. Glasscock*, 8 Mo. 577; *Lewis' Ex'rs v. Overby's Adm'rs*, 28 Grat. (Va.) 627; *Breitling v. Marx*, 123 Ala. 222, 26 South. 203; *Echols v. Phillips*, 112 Ga. 700, 37 S. E. 977.

²² "The authorities," says Prof. Knowlton in his edition of Anson on Contracts, "are not in accord upon this question; and, while much may depend on the wording of the statute allowing the scroll, still it is believed that, if the device adopted is intended to be a seal, it is to be regarded as such, though the intention be not expressly declared. The presumption is that the parties undertook to execute such an instrument as would be effectual for the purpose intended." Knowlton's Anson, Cont. 55. See *Burton v. Leroy*, 5 Sawy. 510, Fed. Cas. No. 2,217; *Trasher v. Everhart*, 3 Gill & J. (Md.) 234; *EAMES v. PRESTON*, 20 Ill. 389; *Brown v. Jordhal*, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 516; *Wing v. Chase*, 35 Me. 260; *Richardson v. Mining Co.*, 22 Cal., at page 157; *Frevall v. Fitch*, 5 Whart. (Pa.) 325, 34 Am. Dec. 558; 21 Am. & Eng. Enc. Law, 894, note.

²³ *Ball v. Dunsterville*, 4 Term R. 313; *Ludlow v. Simond*, 2 Caines, Cas. 1, 2 Am. Dec. 291; *Pickens v. Rymer*, 90 N. C. 282, 47 Am. Rep. 521; *Davis v. Burton*, 3 Scam. (Ill.) 41, 36 Am. Dec. 511; *Yale v. Flanders*, 4 Wis. 96; *Burnett v. McCluey*, 78 Mo., at page 688; *Hollis v. Pond*, 7 Humph. (Tenn.) 221; *In re Hess' Estate*, 150 Pa. 346, 24 Atl. 676; *Norvell v. Walker*, 9 W. Va. 447; *Citizens' Building Ass'n v. Cummings*, 45 Ohio St. 664, 16 N. E. 841.

²⁴ *Shep. Touch*, 57; *Cook v. Brown*, 34 N. H. 476; *Johnson v. Farley*, 45 N. H. 505; *Overman v. Kerr*, 17 Iowa. 490; *Fisher v. Hall*, 41 N. Y. 421; *Duer v. James*, 42 Md. 492; *Younge v. Guilbeau*, 3 Wall. 641, 18 L. Ed. 262; *Harris v. Regester*, 70 Md. 109, 16 Atl. 386. Obtaining deed by fraud, no delivery. *Fisher v. Beckwith*, 30 Wis. 55, 11 Am. Rep. 516; *Gould v. Wise*, 97 Cal. 532, 32 Pac. 576, 33 Pac. 323.

²⁵ *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 241, 31 Pac. 513; *Bogie v. Bogie*, 35 Wis. 659.

for his benefit,²⁶ or by words or conduct indicating an intention that the instrument shall become binding though it is retained in the possession of the party executing it.²⁷ In all cases there must be an intention to deliver the instrument. Merely to part with the possession of it, without intending thereby to render it operative, is not a delivery.²⁸

²⁶ *Peavey v. Tilton*, 18 N. H. 151, 45 Am. Dec. 365; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377; *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617; *Douglas v. West*, 140 Ill. 455, 31 N. E. 403; *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811; *Williams v. Latham*, 113 Mo. 165, 20 S. W. 99; *Brown v. Brown*, 66 Me. 316; *Duer v. James*, 42 Md. 492; *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153; *Colyer v. Hyden*, 94 Ky. 180, 21 S. W. 868; *White v. Pollock*, 117 Mo. 467, 22 S. W. 1077, 38 Am. St. Rep. 639.

²⁷ *XENOS v. WICKHAM*, L. R. 2 H. L. 296; *ROBERTS v. SECURITY CO.* [1897] 1 Q. B. 111; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Benneson v. Aiken*, 102 Ill. 284, 40 Am. Rep. 592; *Rodemeier v. Brown*, 169 Ill. 347, 48 N. E. 468, 61 Am. St. Rep. 176; *McCullough v. Day*, 45 Mich. 554, 8 N. W. 535; *Dunham v. Pitkin*, 53 Mich. 504, 19 N. W. 166; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147. Recording of deed by grantor may be presumptive evidence of delivery. *Glaze v. Three Rivers, etc., Ins. Co.*, 87 Mich. 349, 49 N. W. 595; *Steele v. Lowry*, 4 Ohio, 72, 19 Am. Dec. 581; *Kemp v. Walker*, 16 Ohio, 118; *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 393; *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; *Swiney v. Swiney*, 14 Lea (Tenn.) 316; *Vaughan v. Godman*, 103 Ind. 499, 3 N. E. 257; *Walton v. Burton*, 107 Ill. 54; *Moore v. Giles*, 49 Conn. 570; *Palmer v. Palmer*, 62 Iowa, 204, 17 N. W. 463; *Whitney v. Hale*, 67 N. H. 385, 30 Atl. 417; *Holmes v. McDonald*, 119 Mich. 563, 78 N. W. 647, 75 Am. St. Rep. 430. The presumption may be rebutted, however, by showing that there was in fact no delivery and acceptance. *Hendricks v. Rasson*, 53 Mich. 575, 19 N. W. 192; *Jefferson Co. Bldg. Ass'n v. Heil*, 81 Ky. 516; *Weber v. Christen*, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68; *Brown v. Brown*, 167 Ill. 631, 47 N. E. 1046; *Fair Haven Marble & Marbleized Slate Co. v. Owens*, 69 Vt. 246, 37 Atl. 246. It is very generally held that the mere fact of recording raises no presumption of delivery. *GIFFORD v. CORRIGAN*, 105 N. Y. 223, 11 N. E. 498; *Hill v. McNichol*, 80 Me. 209, 13 Atl. 883; *Barnes v. Barnes*, 161 Mass. 381, 37 N. E. 749; *Babbitt v. Bennett*, 68 Minn. 260, 71 N. W. 22.

²⁸ *Jordan v. Davis*, 108 Ill. 336; *Adams v. Ryan*, 61 Iowa, 723, 17 N. W. 159; *Ireland v. Geraghty (C. C.)* 15 Fed. 45. "A delivery may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor, and the person to whom it is delivered, that the deed shall presently become operative and effectual; that the grantor loses all control over it; and that by it the grantee is to become possessed of the estate,—constitutes a sufficient delivery. The very essence of the delivery is the intention of the party." *Marshall D. Ewell*, in note to *Ireland v. Geraghty*, *supra*. And see *Bryan v. Wash*, 2 Gilman (Ill.) 565; *Walker v. Walker*, 42 Ill. 311; *Duer v. James*, 42 Md. 492; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Gregory v. Walker*, 38 Ala. 26; *Burkholder v. Casad*, 47 Ind. 418; *Rogers v. Carey*, 47 Mo. 235, 4 Am. Rep. 322; *Williams v. Schatz*, 42 Ohio St. 47; *Goodlet v. Kelly*, 74 Ala. 213; *Davis v. Williams*, 57 Miss. 843; *Burnett v. Burnett*, 40 Mich. 361. Where a deed is placed in the hands of a depositary to be delivered to the grantee upon the death of the grantor, or at any other time, but the grantor reserves the right and power to recall it at any time, there is no delivery.

To constitute a good delivery, it is generally held in this country that there must also be an acceptance by the other party,²⁹ but the acceptance need not always be expressly shown. Where the instrument is clearly beneficial to the other party, its acceptance will be presumed,³⁰ though, of course, this cannot be so, even when it is beneficial, if acceptance is in fact refused, for a man cannot be compelled to accept even a benefit.³¹

Possession by the grantee or obligee is *prima facie* evidence of delivery and acceptance.³²

As the delivery of a contract under seal is what makes it operative, its date is the date of delivery. The date appearing on the instrument is entirely immaterial. It may have no date at all, or an impossible date.³³ In the absence of anything to show the contrary, a deed will be presumed to have been delivered on the day of its date, but delivery at a different time may always be shown by extrinsic evidence.³⁴

Same—Escrow.

A deed may be delivered to a stranger, to be by him delivered to the other party to it on the fulfillment of certain conditions, in which case it does not take effect until the condition is fulfilled.³⁵ This is a delivery in escrow, and during this period the deed is termed an "escrow." Immediately upon fulfillment of the conditions, the deed

Cook v. Brown, *supra*; Stinson v. Anderson, 96 Ill. 373; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592; Baker v. Haskell, 47 N. H. 479, 93 Am. Dec. 455; Brown v. Brown, 66 Me. 316; Duer v. James, 42 Md. 492.

²⁹ Moore v. Flynn, 135 Ill. 74, 25 N. E. 844; Mitchell's Lessee v. Ryan, 3 Ohio St. 377; Cobett v. Norcross, 35 N. H. 99; Leppoc v. Bank, 32 Md. 136; Comer v. Baldwin, 16 Minn. 172 (Gil. 151); MEIGS v. DEXTER, 172 Mass. 217, 52 N. E. 75. Third parties may acquire rights by attachment or otherwise at any time before acceptance. Bell v. Bank, 11 Bush (Ky.) 34, 21 Am. Rep. 205; Parmelee v. Simpson, 5 Wall. 81, 18 L. Ed. 542; Day v. Griffith, 15 Iowa, 104.

³⁰ Peavey v. Tilton, 18 N. H. 151; Mitchell's Lessee v. Ryan, 3 Ohio St. 377; Halluck v. Bush, 2 Root (Conn.) 26, 1 Am. Dec. 60; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147; Whitney v. Hale, 67 N. H. 385, 30 Atl. 417.

³¹ See Leake, Cont. 81; BUTLER AND BAKER'S CASE, 3 Coke, 26b; St. Louis, I. M. & S. Ry. Co. v. Ruddell, 53 Ark. 32, 13 S. W. 418; Atwood v. Marshall, 52 Neb. 173, 71 N. W. 1064. And see cases cited *supra*, note 27.

³² Keedy v. Moats, 72 Md. 325, 19 Atl. 965; Dawson v. Hall, 2 Mich. 390; Wood v. Chetwood, 44 N. J. Eq. 64, 14 Atl. 21.

³³ McMichael v. Carlyle, 53 Wis. 504, 10 N. W. 556.

³⁴ Faulkner v. Adams, 126 Ind. 459, 26 N. E. 170; Saunders v. Blythe, 112 Mo. 1, 20 S. W. 319; Smith v. Porter, 10 Gray (Mass.) 66; Battles v. Fobes, 21 Pick. (Mass.) 239.

³⁵ Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592.

becomes operative, without actual delivery by the depositary.³⁶ To constitute an escrow, the delivery to the depositary must be conditional. If it is merely postponed, the delivery to him is an effective delivery to the grantee or obligee, and not a delivery in escrow.³⁷ A deed thus conditionally delivered must be delivered to a stranger. If it is delivered to the other party, or to his agent, it will take effect at once, in spite of the conditions, on the ground that a delivery in fact outweighs verbal conditions.³⁸

There is no delivery, even as an escrow, where the grantor or obligor retains control of the deed with power to withdraw it.³⁹

Upon delivery of an escrow, and performance or happening of the condition, the deed becomes effective from the date of the original delivery; so that, if a bond is delivered as an escrow, and before fulfillment of the condition the obligor and obligee die, yet, on fulfillment of the condition, it becomes an effective bond, and charges the assets of the deceased obligor.⁴⁰

Execution in Blank.

A deed executed in blank—that is, completely sealed and delivered, with an omission of a material particular—is void, and cannot be made good by subsequently filling in the blank without a re-execution, or what is equivalent thereto.⁴¹

³⁶ *Pruitsman v. Baker*, *supra*; *Couch v. Meeker*, 2 Conn. 302, 7 Am. Dec. 274; *White Star Line Steamboat Co. v. Moragne*, 91 Ala. 610, 8 South. 867.

³⁷ *Martin v. Flaharty*, 13 Mont. 96, 32 Pac. 287, 19 L. R. A. 242, 40 Am. St. Rep. 415.

³⁸ *Co. Litt.* 36a; *Dawson v. Hall*, 2 Mich. 390; *Fairbanks v. Metcalf*, 8 Mass. 230; *Foley v. Cowgill*, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49; *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379; *Miller v. Fletcher*, 27 Grat. (Va.) 403, 21 Am. Rep. 356; *Braman v. Bingham*, 26 N. Y. 483; *Cocks v. Barker*, 49 N. Y. 110; *Graves v. Tucker*, 10 Smedes & M. (Miss.) 9; *Ordinary of State v. Thatcher*, 41 N. J. Law, 403, 32 Am. Rep. 225; *Gibson v. Partee*, 2 Dev. & B. (N. C.) 530; *Williams v. Higgins*, 69 Ala. 517; *Richmond v. Morford*, 4 Wash. St. 337, 30 Pac. 241, 31 Pac. 513; *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799, 17 L. R. A. 511; *Campbell v. Jones*, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; *Dixon v. Bank*, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193.

In New York it has recently been held that the rule does not apply when the instrument does not relate to real estate, at least where it does not require a seal for its validity. *BLEWITT v. BOORUM*, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 576. Quere, whether the rule still prevails in England. *Anson, Cont.* (8th Ed.) 53; *HUDSON v. REVETT*, 5 Bing. 368, 387.

³⁹ *Pruitsman v. Baker*, *supra*; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Brown v. Brown*, 66 Me. 316.

⁴⁰ *Leake, Cont.* 79.

⁴¹ *Leake, Cont.* 79; *POWELL v. DUFF*, 3 Camp. 181; *WEEKS v. MAILLARDET*, 14 East, 568. Blank for sum of money afterwards filled in. *HUDSON v. REVETT*, 5 Bing. 368. Since authority to execute a deed must be conferred by instrument under seal, in strictness authority to fill a blank in a deed otherwise executed cannot be conferred by parol. Many courts, however,

Deed Poll and Indenture.

Formerly there was a distinction between a deed poll and an indenture. A deed poll was a deed made by one party, and having a polled or smooth-cut edge. Where a deed was made by two or more parties, and contained mutual covenants, it was copied for each on the same parchment, and the copies cut apart with indented edges, so as to enable them to be identified by fitting the parts together. Such deeds were called indentures. The distinction, even where it has not been abolished by statute, is no longer of any practical importance; but the terms are still used,—the term “deed poll” to signify a deed made by one party only, and the term “indenture,” a deed made between two or more parties, all of whom execute it.

CHARACTERISTICS OF CONTRACT UNDER SEAL.

33. The chief characteristics of a deed or contract under seal are that:

- (a) **The recitals are conclusive against the parties. They are said to be estopped thereby.**
- (b) **It merges a prior simple contract.**
- (c) **A right of action is not barred until the lapse of a longer time than in case of simple contracts.**
- (d) **No consideration is necessary.**

EXCEPTIONS—(1) Contracts in partial restraint of trade, though under seal, require consideration.

(2) Where there was a consideration, it may be shown to have been illegal or immoral.

(3) Courts of equity will not specifically enforce a deed without consideration.

(4) By statute in some states the distinction between sealed and unsealed instruments is abolished, while in others a seal is merely declared presumptive, but rebuttable, evidence of a consideration.

Estoppel by Deed.

Statements made in a simple contract, though strong evidence against the parties thereto, are not absolutely conclusive against them, but may be contradicted. Statements made in a deed, however, are absolutely conclusive against the parties to the deed or their privies in any legal proceedings between them taken upon the deed.⁴² “The

to-day recognize the validity of a deed in which blanks have been so filled by an agent authorized by parol. See Tiff. Ag. 23.

⁴² Carver v. Jackson, 4 Pet. 1, at page 83, 7 L. Ed. 761; Jackson v. Parkhurst, 9 Wend. (N. Y.) 209; Smith v. Burnham, 9 Johns. (N. Y.) 306; Cutler v. Dickinson, 8 Pick. (Mass.) 386; Dobbins v. Cruger, 108 Ill. 188; City of Ottawa v. Bank, 105 U. S. 342, 26 L. Ed. 1127; Gerry v. Stimson, 60 Me. 186; Thompson v. Smith, 96 Mich. 258, 55 N. W. 886; Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130; Moore v. Earl, 91 Cal. 632, 27 Pac. 1087; Chapman v. Persinger's Ex'x, 87 Va. 581, 13 S. E. 549; Billingsley v. Harris, 79 Wis. 103, 48 N. W.

principle is that, where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted."⁴³ Such a prohibition to deny facts is termed an "estoppel by deed." The statements, however, must not be of immaterial matters, or matters by way of general recital, and the deed must be valid.⁴⁴ It is settled also that an acknowledgment in a deed of the receipt of consideration is not conclusive, but may be contradicted.⁴⁵ Recitals in a deed are, of course, only conclusive against the parties thereto and their privies, or those claiming under or through them. They do not work an estoppel as between strangers, nor as between a stranger and a party to the deed.⁴⁶

Merger.

Where, after making a simple contract, the parties enter into an identical engagement under seal, the simple contract is merged in the deed, and becomes extinct; one cannot have, in respect of the same demand, a coexisting remedy, by proceeding both on covenant and on simple contract.⁴⁷ This extinction is called "merger." The contracts, however, must be the same,—that is, the subject-matter must be identical,—and they must be between the same parties.⁴⁸

108; *Metropolitan Ins. Co. v. McCoy*, 124 N. Y. 47, 26 N. E. 345, 11 L. R. A. 708; *Rogers v. Bollinger*, 59 Ark. 12, 26 S. W. 12; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Johnston v. Oliver*, 51 Ohio St. 6, 36 N. E. 458; *Willis v. Terry* (Ky.) 24 S. W. 621.

⁴³ *Bowman v. Taylor*, 2 Adol. & E. 278.

⁴⁴ *Wallace's Lessee v. Miner*, 6 Ohio, 367; *Zimmler v. Water Co.*, 57 Cal. 221.

⁴⁵ *Wilkinson v. Scott*, 17 Mass. 249; *Irvine v. McKeon*, 23 Cal. 472; *Witbeck v. Waine*, 16 N. Y. 532; *White v. Miller*, 22 Vt. 380; *Thayer v. Viles*, 23 Vt. 494; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Smith v. Arthur*, 110 N. C. 400, 15 S. E. 197; *Union Mut. Ins. Co. v. Kirchoff*, 133 Ill. 368, 27 N. E. 91.

⁴⁶ *Thomason v. City of Dayton*, 40 Ohio St. 63; *Allen v. Allen*, 45 Pa., at page 473; *Brittain v. Daniels*, 94 N. C. 781; *Reeves v. Brayton*, 36 S. C. 384, 15 S. E. 658.

⁴⁷ *Price v. Moulton*, 10 C. B. 561; *Banorgree v. Hovey*, 5 Mass. 11, 4 Am. Dec. 17; *Leonard v. Hughlett*, 41 Md. 380; *Curson v. Monteiro*, 2 Johns. (N. Y.) 308; *Rhoads v. Jones*, 92 Ind. 328; *Robbins v. Ayres*, 10 Mo. 538, 47 Am. Dec. 125; *McNaughten v. Partridge*, 11 Ohio, 223, 28 Am. Dec. 731; *Burnes v. Allen*, 31 N. C. 370; *Berry v. Bacon*, 28 Miss. 318; *Griswold v. Eastman*, 51 Minn. 189, 53 N. W. 542; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239. But see *Shelby v. Railroad Co.*, 143 Ill. 385, 32 N. E. 438; *Saville v. Chalmers*, 76 Iowa, 325, 41 N. W. 30; post, p. 478.

⁴⁸ *Hutchins v. Hebbard*, 34 N. Y. 24; *Day v. Leal*, 14 Johns. (N. Y.) 404. If the contract under seal is expressly received as collateral security for performance of the simple contract, or if it merely recognizes the debt, and fixes the mode of ascertaining its amount, there is no merger. *Marryat v. Marryat*, 28 Beav. 224; *Van Vleet v. Jones*, 20 N. J. Law, 340, 43 Am. Dec. 633; *Rees*

Limitation of Actions.

A right of action arising out of a simple contract is barred by the lapse of a shorter period of time than a right of action arising out of a contract under seal. The respective periods vary somewhat under the statutes of the different states, but generally an action on a simple contract is barred in six years or less, while an action on a sealed instrument is not barred if brought within ten, or, in some jurisdictions, twenty, years.

Gratuitous Promises.

At common law, a gratuitous promise, or promise for which the promisor obtains no consideration, is binding if made under seal,⁴⁹ but is absolutely void in the absence of a seal. This characteristic of contracts under seal is often accounted for on the ground that their solemnity imports a consideration, but the supposition is historically untrue. At common law, even if it were allowable to show that there is no consideration for a deed, and if the obligee or grantee were to admit that there was no consideration, it could not affect the validity of the deed. It derives its validity solely from its form. The doctrine of consideration is of a much later date than that at which a contract under seal was in full efficacy, an efficacy which it owed entirely to its form.⁵⁰

Same—Exceptions at Common Law.

Even at common law a contract in partial restraint of trade, though made under the formality of a seal, must be supported by a consideration.⁵¹

And as a general rule, if there be a consideration for a deed, it is open to the party sued on the contract to show that the consideration was illegal or immoral, in which case the deed is void.⁵²

v. Logsdon, 68 Md. 93, 11 Atl. 708; Brengle v. Bushey, 40 Md., at page 147, 17 Am. Rep. 586; Charles v. Scott, 1 Serg. & R. (Pa.) 294; post, p. 478.

⁴⁹ 2 Bl. Comm. 446; Cooch v. Goodman, 2 Q. B. 580; Fallowes v. Taylor, 7 Term R. 475; McMILLAN v. AMES, 33 Minn. 257, 22 N. W. 612; Dorr v. Munsell, 13 Johns. (N. Y.) 430; Van Valkenburgh v. Smith, 60 Me. 97; Harris v. Harris' Ex'r, 23 Grat. (Va.) 737; Wing v. Peck, 54 Vt. 245; Page v. Trufant, 2 Mass. 159, 3 Am. Dec. 41; State v. Gott, 44 Md. 341; Edelin v. Sanders, 8 Md. 118; Day v. Davis, 64 Miss. 253, 8 South. 203.

⁵⁰ Anson, Cont. (4th Ed.) 49.

⁵¹ Mallan v. May, 11 Mees. & W. 665; Palmer v. Stebbins, 3 Pick. (Mass.) 188, 15 Am. Dec. 204; Wiley v. Baumgardner, 97 Ind. 68, 49 Am. Rep. 427; Keeler v. Taylor, 53 Pa. 467, 91 Am. Dec. 221. Of course this does not apply to contracts that are to such an extent in restraint of trade as to be contrary to public policy. Such contracts are void, as being illegal, without regard to the question of consideration. Alger v. Thacher, 19 Pick. (Mass.) 51, 31 Am. Dec. 119. See post, p. 305.

⁵² Collins v. Bluntern, 1 Smith, Lead. Cas. 369; Logan v. Plummer, 70 N. C. 388. And see Paxton v. Popham, 9 East, 421.

Same—Exceptions in Equity.

The idea of consideration as a necessary element of contract has always met with peculiar favor in courts of chancery. Equity will not grant its peculiar remedy of specific performance, nor exercise its peculiar power to correct mistakes and reform contracts, where the promises are without consideration, even though they are under seal.⁵³ So, also, in the exercise of its peculiar power of declaring a contract void and setting it aside on the ground of fraud and undue influence, it will look into the question of consideration, and absence of consideration will be regarded as corroborative evidence of fraud and undue influence.⁵⁴

Even a court of equity, however, will not relieve a person from his obligation under a sealed contract, simply for want or failure of consideration.⁵⁵

Same—Statutory Changes in the Law.

In some of the states the common-law rules in relation to sealed instruments have been either altogether abolished or greatly modified by statute. In some states it is declared that any written instrument, whether under seal or not, is presumptive evidence of a consideration, and all distinctions between sealed and unsealed instruments are expressly abolished, and in these states want or failure of consideration may always be shown, even though the instrument is sealed.⁵⁶

In other states the distinction between sealed and unsealed instruments is not altogether abolished; but it is declared that the seal shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the instrument were not sealed. The New Jersey court, in an action on a sealed note presented by a father to his daughter as a gift, held that such a statute as this did not abolish all distinctions between simple contracts and specialties, but merely established new rules of evidence, for the purpose of allowing parties to an instrument under seal to show that there was no consideration, where they intended that there should be a consideration; and that it did not make it impossible for parties intentionally to enter into binding gratuitous promises.⁵⁷

⁵³ *Smith v. Wood*, 12 Wis. 425; *Bayler v. Com.*, 40 Pa. 37, 80 Am. Dec. 551; *Black v. Cord*, 2 Har. & G. (Md.) 100; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171; *Snyder v. Jones*, 38 Md. 542; *Anon.*, 12 Mod. 603.

⁵⁴ *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Goudy v. Gebhart*, 1 Ohio St. 262; *Mortland v. Mortland*, 151 Pa. 593, 25 Atl. 150.

⁵⁵ *Doughty v. Miller*, 50 N. J. Eq. 529, 25 Atl. 153.

⁵⁶ There are such statutes as this in California, Kentucky, Indiana, Iowa, Kansas, and probably in other states.

⁵⁷ *ALLER v. ALLER*, 40 N. J. Law, 446.

NECESSITY FOR CONTRACT UNDER SEAL.

34. A contract under seal is necessary at common law—

(a) Where the promise is without consideration.

(b) Formerly, corporations could only contract under seal, with some few exceptions; but with us they can make contracts which they have the power to enter into in the same manner as a natural person, unless restricted by charter.

(c) Conveyances of land are in most jurisdictions required to be under seal.

It is usually a matter of choice with persons whether they will contract by word of mouth or simply in writing, or in writing under seal; but in some cases, either at common law or by statute, it is necessary to employ the form of a deed.

At Common Law—Gratuitous Promises—Contracts with Corporations.

There are two cases in which the old common law required that a contract should be made under seal, namely: (1) Where the contract was not founded on a consideration; and (2) where it was made by a corporation.

A gratuitous promise, or contract for which there is no consideration, must be made by deed; otherwise it will be void. This has already been shown to furnish a distinguishing characteristic between contracts under seal and simple contracts. It is unnecessary to say more on the subject.

Under the old common law the rule was that, with a few exceptions, a corporation could only contract under the corporate seal, but this rule has long been repudiated in this country, and now a corporation, unless restricted by its charter or by statute, may contract in the same manner as a natural person. This will be more fully explained in another connection.⁵⁸

Conveyances of Land.

At common law, a conveyance of land was not required to be by deed, but in most jurisdictions this is necessary. It is not necessary to go into the question, as it belongs more properly to the subject of real property. Sometimes a seal is made necessary by statute in the case of particular contracts.

⁵⁸ Post, p. 192.

CHAPTER IV.

CONTRACTS REQUIRED TO BE IN WRITING—STATUTE OF FRAUDS.

- 35-36. In General of Requirement of Writing.
- 37. Statute of Frauds—In General.
- 38. Contracts within Section 4.
- 39. Promise by Executor or Administrator.
- 40. Promise to Answer for Debt, Default, or Miscarriage of Another.
- 41. Agreement in Consideration of Marriage.
- 42. Contract or Sale of Lands.
- 43. Agreement not to be Performed within One Year.
- 44-49. Form Required.
- 50-51. Effect of Noncompliance.
- 52-55. Contracts within Section 17.
- 56. Acceptance and Receipt.
- 57-58. Earnest and Part Payment.
- 59. Form Required.
- 60. Effect of Noncompliance.

IN GENERAL OF REQUIREMENT OF WRITING.

- 35. At common law, bills of exchange and promissory notes must be in writing.
- 36. By statute, writing is in some states declared necessary for the following contracts:
 - (a) Acceptance of a bill of exchange or other order for the payment of money.
 - (b) Acknowledgment of a debt barred by the statute of limitations.
 - (c) New promise by infant after attaining his majority.
 - (d) By the statute of frauds writing is necessary in certain specified contracts.

In the preceding chapter we have dealt with those contracts which acquire validity by reason of their form alone, and we now pass to simple or parol contracts, which depend for their validity upon the presence of consideration. As we have seen, however, there are some simple contracts which, while not in the solemn form of a deed or record, are required by law to be in writing, and which, therefore, depend not only on the presence of consideration, as in the case of other simple or parol contracts, but also on their form. These contracts, in so far as their form is concerned, we shall deal with in the present chapter.

Independently of any requirement of law as to form, an agreement which might be made orally may require writing, because of the in-

tention of the parties not to be bound until their agreement is reduced to writing. We have considered the question in treating of offer and acceptance.¹

Common Law.

The only requirement of form for simple contracts which can be said to exist independently of statute is in the case of negotiable bills of exchange and promissory notes. A bill of exchange is a kind of contract which originated in the custom of merchants, and which is designed to take the place of money, to some extent, as a circulating medium; and from its very nature and use as a negotiable instrument it must be in writing. The same may be said of promissory notes, which, whether by statute or the law merchant, are negotiable, and stand on the same footing as bills of exchange. Besides the mere necessity of writing, these instruments are required by law to be in a particular form, but this is matter more properly for a work on negotiable instruments.

Statutory Requirements of Form.

The statutory requirements of form in simple contracts are mainly to be found in the statute of frauds, but before going into these we must notice some others which are not so general.

Ordinarily, a bill of exchange or other order for the payment of money may be accepted orally, but by statute, in some states, the acceptance is required to be in writing.²

At common law, a contract of insurance need not necessarily be evidenced by a written policy.³ In some of the states, however, statutes have been enacted prescribing particular forms for such contracts.

In some of the states an acknowledgment of a debt barred by the statute of limitations is required to be in writing, and signed by the debtor, in order to take the debt out of the statute.

In some states, a promise by a person, after becoming of age, to pay a debt contracted during his infancy, is required by statute to be in writing.⁴

¹ Ante, pp. 28, 42.

² Norton, B. & N. (3d Ed.) 91, 99.

³ Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. Ed. 291; Sanborn v. Insurance Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419; First Baptist Church v. Insurance Co., 19 N. Y. 305; Ellis v. Insurance Co., 50 N. Y. 402, 10 Am. Rep. 495; Nebraska & I. Ins. Co. v. Seivers, 27 Neb. 541, 43 N. W. 351; Zell v. Insurance Co., 75 Wis. 521, 44 N. W. 828; Wooddy v. Insurance Co., 31 Grat. (Va.) 362, 31 Am. Rep. 732; Putnam v. Insurance Co., 123 Mass. 324, 25 Am. Rep. 93; Hardwick v. Insurance Co., 20 Or. 547, 26 Pac. 840; Stickley v. Mobile Ins. Co., 37 S. C. 56, 16 S. E. 280, 838; Howard Ins. Co. v. Owen's Adm'r, 94 Ky. 197, 21 S. W. 1037.

⁴ Post, p. 167.

By act of congress assignments of patents and copyrights are required to be in writing.⁵

In most, if not in all, the states there are statutes regulating the mode of conveying land, and requiring writing, together with other formalities. In some states a deed is required. This, however, is a matter more properly for a work on real property.

STATUTE OF FRAUDS.

The famous statute of frauds and perjuries, 29 Car. II. c. 3, was enacted in England in 1677, and, as stated in its recital, had for its object the "prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury."

The original statute, which is substantially followed by the statutes of most of our states, contains two sections—the fourth and the seventeenth—which affect the form of certain simple contracts.⁶

This statute has been substantially followed by the statutes of most of our states, but in some states the statute is materially different. These variations will be noticed as we go along.

As the seventeenth section differs materially from the fourth, it will be better to treat them separately. In doing so we shall consider (1) the nature of the contracts specified, (2) the form required, and (3) the effect of failure to comply with the provisions of the statute.

STATUTE OF FRAUDS—IN GENERAL.

37. The statute does not apply to—

- (a) **Contracts created by law.**
- (b) **Instruments created under, and deriving their obligation from, special statutes.**
- (c) **Executed contracts.**

Before taking up in turn the special contracts specified in these sections, it is proper to state the kinds of contract generally to which the statute does not apply.

In the first place, it applies only to contracts made in fact; it does not include so-called contracts created by law, or quasi contracts. If a duty is imposed by law to pay money or perform other duties, without an agreement or promise in fact, no writing is necessary to support an action on the implied assumpsit.⁷

⁵ Rev. St. U. S. §§ 4898, 4955 [U. S. Comp. St. 1901, pp. 3387, 3407].

⁶ For the provisions of sections 4 and 17, see post, pp. 65, 97.

⁷ *Goodwin v. Gilbert*, 9 Mass. 510; *Arnold v. Garst*, 16 R. I. 4, 11 Atl. 167; *Pike v. Brown*, 7 Cush. (Mass.) 133; *Sage v. Wilcox*, 6 Conn., at page 84;

Nor does the statute apply to such instruments as are created under, and derive their obligation from, special statutes, without the acceptance or assent of the party for whose ultimate benefit they are given,—as in the case of an undertaking on appeal, the requisites of which are prescribed by a special statute.⁸

Nor does the statute have any effect where the contract has been executed on both sides, for the purpose of the statute is to exclude parol evidence of the contracts within their provisions, and not to prohibit execution of oral contracts. It applies to executory contracts only.⁹ We shall see, in treating of the particular kinds of contracts, that under some circumstances part performance may take them out of the statute.

Oral agreements, modifying prior written contracts, are within the statute;¹⁰ but it seems that a subsequent contract for a waiver or abandonment of the original contract is valid.¹¹

SAME—CONTRACTS WITHIN SECTION 4.

38. The fourth section of the English statute, which has been substantially followed in most of the states, enacts: "That no action shall be brought.

- (a) "Whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate;
- (b) "Or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;
- (c) "Or to charge any person upon any agreement made upon consideration of marriage;

Smith v. Bradley, 1 Root (Conn.) 150; Howard v. Whitt (Ky.) 2 S. W. 776; post, p. —, note —.

⁸ Thompson v. Blanchard, 3 N. Y. 335; Doolittle v. Dininny, 31 N. Y. 350.

⁹ Stone v. Dennison, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; Lord Bolton v. Tomlin, 5 Adol. & El. 856; Brown v. Trust Co., 117 N. Y. 266, 22 N. E. 952; Schultz v. Noble, 77 Cal. 79, 19 Pac. 182; Swanzey v. Moore, 22 Ill. 63, 74 Am. Dec. 134; James v. Morey, 44 Ill. 352; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Webster v. Le Compte, 74 Md. 249, 22 Atl. 232; Baldoek v. Atwood, 21 Or. 73, 26 Pac. 1058; Pireaux v. Simon, 79 Wis. 392, 48 N. W. 674; Anderson School Tp. v. Milroy Lodge, 130 Ind. 108, 29 N. E. 411, 30 Am. St. Rep. 206; Harris v. Harper, 48 Kan. 418, 29 Pac. 697; Doherty v. Doe, 18 Colo. 456, 33 Pac. 165; Lagerfelt v. McKie, 100 Ala. 430, 14 South. 281.

¹⁰ Stead v. Dawber, 10 Adol. & E. 57; Marshall v. Lynn, 6 Mees. & W. 109; Swain v. Seamens, 9 Wall. 254, 19 L. Ed. 554; Hill v. Blake, 97 N. Y. 216; Abell v. Munson, 18 Mich. 306, 160 Am. Dec. 165; Burns v. Real-Estate Co., 52 Minn. 31, 53 N. W. 1017; WALTER v. VICTOR G. BLOEDE CO., 94 Md. 80, 50 Atl. 433. Contra: CUMMINGS v. ARNOLD, 3 Mete. (Mass.) 486, 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. (Mass.) 31; Whitier v. Dana, 10 Allen (Mass.) 326; Negley v. Jeffers, 28 Ohio St. 90.

¹¹ Post, p. —.

- (d) "Or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them;
- (e) "Or upon any agreement that is not to be performed within the space of one year from the making thereof;
"Unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person therunto by him lawfully authorized."

SAME—PROMISE BY EXECUTOR OR ADMINISTRATOR.

39. The statute applies only to promises—

- (a) To answer for debts or liabilities of the deceased, and
- (b) To answer for them out of the property of the promisor.

An executor or administrator may sue or be sued upon obligations devolving upon him as the representative of the deceased, and he may be compelled to carry out the directions of the deceased in respect of legacies, or to give effect to the rules of law relating to the division of the estate of an intestate; but in neither case is he bound to pay anything out of his own pocket. His liabilities are limited by the assets of the deceased. He may, however, if he chooses, to save the credit of the deceased, or for any other reason, make promises to answer for damages or pay debts—which is included in the expression, "answer damages"—out of his own estate; but, in order that the promise may be binding on him, it must be in writing, signed by him or his agent.

The statute only applies to promises to answer for debts or liabilities of the decedent. It does not apply to original undertakings by the executor or administrator, and a promise, therefore, by an executor to pay the heir money if he will forbear further opposition to the probate of the will, is not within the statute.¹² Nor does it apply to promises to pay debts of the decedent out of the assets of the estate.¹³

SAME—PROMISE TO ANSWER FOR DEBT, DEFAULT, OR MIS-CARRIAGE OF ANOTHER.

40. The following points should be noted:

- (a) The debt, default, or miscarriage must be that of "another person," and, therefore, for the statute to apply,
 - (1) There must be either a present or prospective primary liability of a third person for which the promisor agrees to answer. He must not himself be or become primarily liable.

¹² BELLOWS v. SOWLES, 57 Vt. 164, 52 Am. Rep. 118. And see Fehlinger v. Wood, 134 Pa. 517, 19 Atl. 746; Wales v. Stout, 115 N. Y. 638, 21 N. E. 1027.

¹³ Stebbins v. Smith, 4 Pick. (Mass.) 97; Pratt v. Humphrey, 22 Conn. 317.

(2) The liability of the third person, therefore, must continue.

- (b) A promise which contemplates payment out of the debtor's property in the hands of the promisor is not within the statute.
- (c) Nor is a promise to the debtor to pay his debt. This generally includes contracts of indemnity, though, if the promise be to answer for another's debt, it is within the statute, notwithstanding it is in the form of a contract of indemnity.
- (d) Nor, according to the weight of authority, does the statute apply where the leading object of the promisor is to subserve some purpose of his own, and his promise is merely incidental.

"Debt, Default, or Miscarriage."

The words "debt, default, or miscarriage" include all liabilities of a third person, however they may arise, and therefore include liabilities arising out of a wrong or tort, as well as those arising out of contract.¹⁴ They also include prospective as well as existing liabilities. "If the future primary liability of a principal is contemplated as the basis of the promise of a guarantor, such promise is within the statute of frauds, precisely as it would be if the liability existed when the promise was made."¹⁵

"Of Another Person."

The promise contemplated by the statute is a promise to answer for the debt, default, or miscarriage of "another person;" or, in other words, a contract of guaranty or suretyship. The statute does not apply to original promises or undertakings, though the benefit accrues to another than the promisor. There must be three parties in contemplation,—a person who is actually or prospectively liable to another person, and a third person who promises the creditor to answer for the debt or liability; or, in other words, a creditor, a principal debtor, and a guarantor of the debt, or surety. Though there is considerable conflict between the courts in their construction of this clause of the statute, the following rules for determining whether a contract comes within it are established by the weight of authority:

- (a) There must be either a present or prospective liability of a third person for which the promisor agrees to answer. If the promisor becomes himself primarily, and not collaterally, liable, the promise is not within the statute, though the benefit from the transaction accrues to a third person.¹⁶ If, for instance, two persons come into a

¹⁴ *Kirkham v. Marter*, 2 Barn. & Ald. 613; *Turner v. Hubbell*, 2 Day (Conn.) 457, 2 Am. Dec. 115; *Mountstephen v. Lakeman*, L. R. 7 Q. B. 202.

¹⁵ *Mead v. Watson*, 57 Vt. 426. And see *Matson v. Wharam*, 2 Term R. 80; *Matthews v. Milton*, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247.

¹⁶ *Baldwin v. Hiers*, 73 Ga. 739; *Morris v. Osterhout*, 55 Mich. 262, 21 N. W. 339; *De Witt v. Root*, 18 Neb. 567, 26 N. W. 360. Where an agent has become liable to his principal by lending money contrary to instructions, his guaranty of the loan is not within the statute. *Crane v. Wheeler*, 48 Minn. 207, 50 N. W. 1033. A promise by a married woman to pay her parent for her

store, and one buys, and the other, to gain him credit, promises the seller, "If he does not pay you, I will," this is a collateral undertaking, and must be in writing; but if he says, "Let him have the goods, and I will pay," or "I will see you paid," and credit is given to him alone, he is himself the buyer, and the undertaking is original.¹⁷ In other words, whether the promise in such a case is within the statute depends on how the credit was given. If it was given exclusively to the promisor, his undertaking is original;¹⁸ but it is collateral if any credit was given to the other party.¹⁹

(b) Even though there is an existing liability of a third person for which the promisor undertakes to answer, still the promise is not within the statute if the terms are such that it effects an extinguishment of such liability; in other words, the liability of the original debtor must continue. A promise to pay another's debt in consideration of the creditor's doing something which will extinguish his claim against the debtor, and release him absolutely, need not be in writing.²⁰ To

support was held a promise to pay her husband's debt. *Perkins v. Westcoat*, 3 Colo. App. 338, 33 Pac. 139.

¹⁷ *Birkmyr v. Darnell*, Salk. 27; *Hartley v. Varner*, 88 Ill. 561; *Nelson v. Boynton*, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; *Greene v. Burton*, 59 Vt. 423, 10 Atl. 575; *Geelan v. Reid*, 22 Ill. App. 165; *Higgins v. Hallock*, 60 Hun, 125, 14 N. Y. Supp. 550; *Boston v. Farr*, 148 Pa. 220, 23 Atl. 901; *Crowder v. Keys*, 91 Ga. 180, 16 S. E. 986. The same is true where a person says: "If I am to do certain work for M., I must be assured of payment by some one," and the person addressed says, "Do it, and I will see you paid." *Mountstephen v. Lakeman*, L. R. 7 H. L. 17. And see cases cited above and in the following notes.

¹⁸ *Chase v. Day*, 17 Johns. (N. Y.) 114; *Hartley v. Varner*, 88 Ill. 561; *Myer v. Grafflin*, 31 Md. 350, 100 Am. Dec. 66; *Grant v. Wolf*, 34 Minn. 32, 24 N. W. 289; *Ellis v. Murray*, 77 Ga. 542; *Hagadorn v. Stronach Lumber Co.*, 81 Mich. 56, 45 N. W. 650; *Peyson v. Conniff*, 32 Neb. 269, 49 N. W. 340; *Mackey v. Smith*, 21 Or. 598, 28 Pac. 974; *Herendeen Mfg. Co. v. Moore*, 66 N. J. Law, 74, 48 Atl. 525; *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529. Where defendant gave plaintiff directions to give his (defendant's) subcontractors material, and charge it to them, which was done, and every month he (defendant) would pay the bill, it was held not to show that credit was given the subcontractors, and that the undertaking was original. *Maurin v. Fogelberg*, 37 Minn. 23, 32 N. W. 858, 5 Am. St. Rep. 814. And see *Owen v. Stevens*, 78 Ill. 462; *Schoenfeld v. Brown*, 78 Ill. 487.

¹⁹ *Welch v. Marvin*, 36 Mich. 59; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Norris v. Graham*, 33 Md. 56; *Northern Cent. Ry. Co. v. Prentiss*, 11 Md. 119; *Aldrich v. Jewell*, 12 Vt. 125, 36 Am. Dec. 330; *Matthews v. Milton*, 4 Yerg. (Tenn.) 576, 26 Am. Dec. 247; *Baldwin v. Hiers*, 73 Ga. 739; *Blank v. Dreher*, 25 Ill. 331; *Langdon v. Richardson*, 58 Iowa, 610, 12 N. W. 622; *Bugbee v. Kendrick*, 130 Mass. 437; *Mead v. Watson*, 57 Vt. 426; *Studley v. Barth*, 54 Mich. 6, 19 N. W. 568; *Robertson v. Hunter*, 29 S. C. 9, 6 S. E. 850; *Harris v. Frank*, 81 Cal. 280, 22 Pac. 856; *Rottmann v. Pohlmann*, 28 Mo. App. 399; *Clark v. Jones*, 87 Ala. 474, 6 South. 362; *Waters v. Shafer*, 25 Neb. 225, 41 N. W. 181.

²⁰ *Goodman v. Chase*, 1 Barn. & Ald. 297; *Teeters v. Lamborn*, 43 Ohio St.

take the promise out of the statute, the original debtor's release must be absolute. If the creditor may still hold him liable at his option, the promise must be in writing.²¹ Novations fall within this class of agreements.

(c) The promise must contemplate payment by the promisor out of his own property, or, at least, not out of the property of the debtor, from which, or from the proceeds of which, the promisor is under a duty to pay, or is authorized to pay; for in such a case the payment is, in effect, by the debtor. The statute has no application to "cases where the original debtor places property of any kind in the hands of a third person, and that person promises to pay the claims of a particular creditor of the debtor. The promise, in such case, is an original promise, and the property placed in his hands is its consideration. In this class of cases it is immaterial whether the liability of the original debtor continues or not."²²

(d) A promise to pay another's debt, to come within the statute, must be made to the creditor, and not to the debtor. A promise to the debtor himself to pay his debt for him does not require writing.²³

144, 1 N. E. 513; *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628; *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247, 8 Am. Rep. 549; *Runde v. Runde*, 59 Ill. 98; *Green v. Solomons*, 80 Mich. 234, 45 N. W. 87; *Carlisle v. Campbell*, 76 Ala. 247; *Palmer v. Witcherly*, 15 Neb. 98, 17 N. W. 364; *Eden v. Chaffee*, 160 Mass. 225, 35 N. E. 675; *Hamlin v. Drummond*, 91 Me. 175, 39 Atl. 551; *Ferst v. Bank*, 111 Ga. 229, 36 S. E. 773; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742.

²¹ *Nelson v. Boynton*, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; *Waggoner v. Gray's Adm'rs*, 2 Hen. & M. (Va.) 612; *Pfaff v. Cummings*, 67 Mich. 143, 34 N. W. 281; *Gray v. Herman*, 75 Wis. 453, 44 N. W. 248, 6 L. R. A. 691; *Murto v. McKnight*, 28 Ill. App. 238; *Miller v. Lynch*, 17 Or. 61, 19 Pac. 845; *Brant v. Johnson*, 46 Kan. 389, 26 Pac. 735; *Riegelman v. Focht*, 141 Pa. 380, 21 Atl. 601, 23 Am. St. Rep. 293; *Greene v. Latham*, 2 Colo. App. 416, 31 Pac. 233. The fact that a lien against the original debtor is released has been held immaterial if the debtor himself remains liable. *Nelson v. Boynton*, *supra*; *Mallory v. Gillett*, 21 N. Y. 412. See post, p. 71. A promise to pay another's debt merely if the promisee will forbear to sue the debtor, which he does, is within the statute. *Gump v. Halberstadt*, 15 Or. 356, 15 Pac. 467 (collecting cases on this point); *Watson v. Randall*, 20 Wend. (N. Y.) 201; *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 318. And see *Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. 539; *Dillaby v. Wilcox*, 60 Conn. 71, 22 Atl. 491, 13 L. R. A. 643, 25 Am. St. Rep. 299; *Parker v. Dillingham*, 129 Ind. 542, 29 N. E. 23.

²² *Wait v. Wait's Ex'r*, 28 Vt. 350. And see *Farley v. Cleveland*, 4 Cow. (N. Y.) 432, 15 Am. Dec. 387; *Peck v. Goff*, 18 R. I. 94, 25 Atl. 690; *Woodruff v. Scaife*, 83 Ala. 152, 3 South. 311; *Belknap v. Bender*, 75 N. Y. 446, 31 Am. Rep. 476; *Ackley v. Parmenter*, 98 N. Y. 425, 50 Am. Rep. 693; *Hughes v. Fisher*, 10 Colo. 383, 15 Pac. 702; *Fehlinger v. Wood*, 134 Pa. 517, 19 Atl. 746; *Leake v. Ball*, 116 Ind. 214, 17 N. E. 918; *Silby v. Frost*, 3 Wash. T. 388, 17 Pac. 887; *Ledbetter v. McGhees*, 84 Ga. 227, 10 S. E. 727; *Mitts v. McMorran*, 85 Mich. 94, 48 N. W. 288; *Keyes v. Allen*, 65 Vt. 667, 27 Atl. 319. But see *Gower v. Stuart*, 40 Mich. 747; *Frame v. August*, 88 Ill. 424.

²³ *EASTWOOD v. KENYON*, 11 Adol. & E. 438; *Windell v. Hudson*, 102

Illustrations of this are where a person buys land or goods, and agrees to pay the purchase money to a creditor of the seller, or, as part of the consideration, assumes a mortgage or other indebtedness of the seller. This is no more than a promise to pay the promisor's own debt in a particular way.²⁴ Nor is a promise to indemnify or save another harmless from any liability which he may incur as the result of a transaction into which he enters at the instance of the promisor—as in the case of a promise to indemnify the promisee against loss from going bail for another—within the statute.²⁵ It is nothing more than a promise to pay a prospective debt of the promisee. There is, however, authority to the contrary.²⁶ It has been sought in some, if not most, of the books to distinguish between contracts within the statute and contracts of indemnity by saying without qualification that a promise of indemnity is not within the statute; but this may mislead. Such a promise to indemnify the promisee against any liability which he may incur as we have mentioned is not within the statute, but it is otherwise where the promise is to indemnify the promisee against any loss he may sustain by reason of the default or miscarriage of a person under liability to him.²⁷ A verbal acceptance of a

Ind. 521, 2 N. E. 303; *Alger v. Scoville*, 1 Gray (Mass.) 391, 395; *Harwood v. Jones*, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; *Mersereau v. Lewis*, 25 Wend. (N. Y.) 243; *Ware v. Allen*, 64 Miss. 545, 1 South. 738, 60 Am. Rep. 67; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427; *Clark v. Jones*, 85 Ala. 127, 4 South. 771; *MEYER v. HARTMAN*, 72 Ill. 442; *Rabbermann v. Wiskamp*, 54 Ill. 179.

²⁴ *Wilson v. Bevans*, 58 Ill. 232; *Clinton Nat. Bank v. Studemann*, 74 Iowa, 104, 37 N. W. 112; *Delp v. Brewing Co.*, 123 Pa. 42, 15 Atl. 871; *Bateman v. Butler*, 124 Ind. 223, 24 N. E. 989; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. 937; *Skinker v. Armstrong*, 86 Va. 1011, 11 S. E. 977; *Neiswanger v. McClellan*, 45 Kan. 599, 26 Pac. 18; *Morris v. Gaines*, 82 Tex. 255, 17 S. W. 538; *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. 677; *Mulvany v. Gross*, 1 Colo. App. 112, 27 Pac. 878; *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. 1117; *American Pencil Co. v. Wolfe*, 30 Fla. 360, 11 South. 488; *Scudder v. Carter*, 43 Ill. App. 252; *Elkin v. Timlin*, 151 Pa. 491, 25 Atl. 139; *First Nat. Bank v. Chalmers*, 144 N. Y. 342, 39 N. E. 331.

²⁵ *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162; *Aldrich v. Ames*, 9 Gray (Mass.) 76; *Thomas v. Cook*, 8 Barn. & C. 728; *Beaman's Adm'rs v. Russel*, 20 Vt. 205, 49 Am. Dec. 775; *Lerch v. Gallop*, 67 Cal. 595, 8 Pac. 322; *Keesling v. Frazier*, 119 Ind. 185, 21 N. E. 552; *Smith v. Delaney*, 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181; *SUTTON v. GREY* [1894] 1 Q. B. 285; *Jones v. Bacon*, 145 N. Y. 446, 40 N. E. 216; *Esch v. White*, 76 Minn. 220, 78 N. W. 1114; *Warren v. Abbett*, 65 N. J. Law, 99, 46 Atl. 575.

²⁶ *MAY v. WILLIAMS*, 61 Miss. 125, 48 Am. Rep. 80; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823. See *Browne*, Stat. Frauds, §§ 161, 162.

²⁷ *NUGENT v. WOLFE*, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291; *Mallory v. Gillett*, 21 N. Y. 412; *Cheesman v. Wiggins*, 122 Ind. 352, 23 N. E. 945; *Easter v. White*, 12 Ohio St. 219; *Clements' Appeal*, 52 Conn. 464. But see *Lerch v. Gallop*, 67 Cal. 595, 8 Pac. 322. A promise by one of the sureties on an official bond to indemnify a co-surety, who became such at his request,

bill of exchange or other order for the payment of money is not within the statute.²⁸

(e) When the leading object of the promisor is, not to become guarantor or surety for the debtor, but to subserve some purpose of his own, and his promise is merely incidental, it is not within the statute.²⁹ Under this rule the holder of a note or other security is bound by a verbal guaranty of its payment, made for the purpose of inducing another to purchase it;³⁰ and the promise by a *del credere* agent to his principal to guaranty the solvency of the persons to whom he sells goods is not within the statute.³¹ Again, if a creditor has, or is about to file, a lien on property to secure his claim, and a third person, whose interests are or may be prejudiced thereby, guaranties the debt in consideration of a release of the lien or forbearance to file it, his object is to remove or prevent the lien, and the guaranty is merely incidental, and some courts hold that it need not be in writing,³² though the weight of authority is probably to the contrary where the liability of the debtor continues.³³ And it has even been held that where the

was held to be within the statute. *Wolverton v. Davis*, 85 Va. 64, 6 S. E. 619, 17 Am. St. Rep. 56.

²⁸ Ante, p. 63.

²⁹ See *Little v. Edwards*, 69 Md. 499, 16 Atl. 134; *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; *Mitchell v. Beck*, 88 Mich. 342, 50 N. W. 305; *First Nat. Bank v. Chalmers*, 120 N. Y. 658, 24 N. E. 848; *Ferst v. Bank of Waycross*, 111 Ga. 229, 36 S. E. 773. An oral promise by an attorney to prosecute a suit and pay all the costs, and, if successful, to have half the amount recovered, otherwise nothing, was held not within the statute. *Willey v. Crane*, 69 Mich. 17, 36 N. W. 734. A contract of reinsurance has been held not within the statute. *Bartlett v. Insurance Co.*, 77 Iowa, 155, 41 N. W. 601. But see, contra, *Egan v. Insurance Co.*, 27 La. Ann. 368.

³⁰ *Milks v. Rich*, 80 N. Y. 269, 36 Am. Rep. 615; *Cardell v. McNeil*, 21 N. Y. 338; *Darst v. Bates*, 95 Ill. 493, at page 512. And see, in case of assignment and guaranty of judgment, *Little v. Edwards*, 69 Md. 499, 16 Atl. 134. So, also, where a person having property of his debtor to sell for payment of the debt guaranties the title to induce the promisee to buy it. *Farnham v. Chapman*, 61 Vt. 395, 18 Atl. 152. But see *Dows v. Swett*, 134 Mass. 142, 45 Am. Rep. 310.

³¹ *Couturier v. Hastie*, 8 Exch. 40, 5 H. L. Cas. 673; *Sherwood v. Stone*, 14 N. Y. 267; *Wolff v. Koppel*, 5 Hill (N. Y.) 458; *Id.*, 2 Denio, 368, 43 Am. Dec. 751; *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 282.

³² *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; *Smith v. Exchange Bank*, 110 Pa. 508, 1 Atl. 760; *Wills v. Brown*, 118 Mass. 138; *Prime v. Koehler*, 77 N. Y. 91; *Dunlap v. Thorne*, 1 Rich. Law (S. C.) 213; *Shook v. Vanmater*, 22 Wis. 532; *Crawford v. King*, 54 Ind. 6; *Helt v. Smith*, 74 Iowa, 667, 39 N. W. 81; *Rogers v. Hardware Co.*, 24 Neb. 653, 39 N. W. 844; *Scott v. White*, 71 Ill. 287; *Borchsenius v. Canutson*, 100 Ill. 82; *Power v. Rankin*, 114 Ill. 52, 29 N. E. 185; *Wooten v. Wilcox*, 87 Ga. 474, 13 S. E. 595; *Flagler v. Lipman*, 1 Misc. Rep. 204, 20 N. Y. Supp. 878.

³³ *Nelson v. Boynton*, 3 Mete. (Mass.) 396, 37 Am. Dec. 148; *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Mallory v. Gillett*, 21 N. Y. 412; *Bunneman v. Wagner*, 16 Or. 433, 18 Pac. 841, 8 Am. St. Rep. 306; *Clark v. Jones*, 85 Ala.

owner of a building, on which the contractor has abandoned work, promises to pay the contractor's workmen what is due them from the contractor if they will go on with the work, the undertaking is original;³⁴ but this decision is a very doubtful one. The contrary has repeatedly been held.³⁵

SAME—AGREEMENT IN CONSIDERATION OF MARRIAGE.

41. The statute applies to "any agreement made upon consideration of marriage."

This clause of the statute does not apply to a promise to marry, the consideration for which is, not the marriage, but the promise of the other party,³⁶ but to promises in consideration of, or conditional upon, a marriage actually taking place, such as promises to pay money, or to make a settlement of property, if the marriage is consummated.³⁷ An

127, 4 South. 771; *Stewart v. Jerome*, 71 Mich. 201, 38 N. W. 895, 15 Am. St. Rep. 252; *Warner v. Willoughby*, 60 Conn. 468, 22 Atl. 1014, 25 Am. St. Rep. 343; *Simpson v. Harris*, 21 Nev. 353, 31 Pac. 1009.

³⁴ *Andre v. Bodman*, 13 Md. 241, 71 Am. Dec. 628 (in this case the claim against the contractor, it seems, was given up, so that there no longer existed any primary liability of a third person); *Crawford v. Edison*, 45 Ohio St. 239, 13 N. E. 80; *Greenough v. Eichholtz* (Pa. Sup.) 15 Atl. 712; *Buchanan v. Moran*, 62 Conn. 83, 25 Atl. 396; *Craft v. Kendrick*, 39 Fla. 90, 21 South. 803; *Hall v. Alford*, 105 Ky. 664, 49 S. W. 444; *Raabe v. Squier*, 148 N. Y. 81, 42 N. E. 516; *Almond v. Hart*, 46 App. Div. 431, 61 N. Y. Supp. 849. And see *Sext v. Geise*, 80 Ga. 698, 6 S. E. 174 (where the promise was to pay for material); *Bice v. Building Co.*, 96 Mich. 24, 55 N. W. 382.

³⁵ See *Farnham v. Davis*, 79 Me. 282, 9 Atl. 725; *Greene v. Latcham*, 2 Colo. App. 416, 31 Pac. 233; *Hutton Bros. v. Gordon*, 2 Misc. Rep. 267, 23 N. Y. Supp. 770; *Wilhelm v. Voss*, 118 Mich. 106, 76 N. W. 308. Where a widow, continuing her deceased husband's business, promised her husband's creditor to pay his debt if he would sell her goods on credit, the promise was held to be within the statute. *Ruppe v. Peterson*, 67 Mich. 437, 35 N. W. 82. And see *Derringer v. Moynihan* (Com. Pl. N. Y.) 10 N. Y. Supp. 540.

³⁶ *Clark v. Pendleton*, 20 Conn. 495; *Short v. Stotts*, 58 Ind. 29; *Blackburn v. Mann*, 85 Ill. 222; *Lewis v. Tapman*, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385. "It would be imputing to the legislature too great an absurdity to suppose that they had enacted that all our courtships, to be valid, must be in writing." *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94, 17 Am. Dec. 44.

³⁷ *Caton v. Caton*, L. R. 1 Ch. App. 137; *Ogden v. Ogden*, 1 Bland (Md.) 254; *Crane v. Gough*, 4 Md. 316; *Henry v. Henry*, 27 Ohio St. 121; *Finch v. Finch*, 10 Ohio St. 507; *Deshon v. Wood*, 148 Mass. 132, 19 N. E. 1, 1 L. R. A. 518; *Chase v. Fitz*, 132 Mass. 359; *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552; *Richardson v. Richardson*, 148 Ill. 563, 36 N. E. 608, 26 L. R. A. 305; *Fleener v. Fleener*, 29 Ind. 564; *Caylor v. Roe*, 99 Ind. 1; *Lloyd v. Fulton*, 91 U. S. 479, 23 L. Ed. 363. A contract by which each party is to retain the title to his or her property, and dispose of it as if unmarried, is within the statute. *Mallory's Adm'r v. Mallory's Adm'r*, 92 Ky. 316, 17 S. W. 737.

agreement between a man and woman that on their marriage the survivor shall take no interest in the property of the other, has been held to be a contract in consideration of marriage.³⁸ On the other hand, an oral contract between a man and woman, by which the man was to provide for the comfort and support of the woman during life, pay her debts, take care of, manage, and improve certain land so as to make it productive, and to that end that the parties should marry and live together on the land, which should be conveyed by the woman to the man in fee simple, was held not to be within the statute, on the ground that the consideration for the conveyance of the land was the provision for the support and comfort of the woman, and not the marriage.³⁹

The marriage of the parties is not such part performance as will take an antenuptial contract out of the operation of the statute.⁴⁰

SAME—CONTRACT OR SALE OF LANDS, OR ANY INTEREST IN OR CONCERNING THEM.

42. The following general rules may be mentioned:

- (a) The contract must be for a substantial interest in land.
- (b) *Fructus industriales*, or crops and other products of land, raised by labor and cultivation, are not an interest therein.
- (c) *Fructus naturales*, or the natural growth and products of land, are an interest in land if the ownership is to pass before, but not if it is not to pass until after, severance.
- (d) A mere license to enter on land is not an interest in land, but it is otherwise with an easement.

The treatment of this clause of the statute belongs more properly to a work on the law of real property, and we need only state the rules governing its application in a general way. The terms "lands," "tenements," and "hereditaments" have a clearly-defined meaning in the law of real property. They are used to denote the subjects of real property, as distinguished from personal property, or goods and chattels. It is often difficult, however, to determine what is an interest in land within this section.

A contract, to require writing as being for an interest in land, must be for a substantial interest, and not for arrangements preliminary to the acquisition of an interest, nor for a remote and inappreciable in-

³⁸ *Carpenter v. Cornings*, 51 Hun, 638, 4 N. Y. Supp. 947. See, also, *Ennis v. Ennis*, 48 Hun, 11. So, also, in case of an agreement that certain property shall go to the survivor. *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157. And see *White v. Bigelow*, 154 Mass. 593, 28 N. E. 904; *Adams v. Adams*, 17 Or. 247, 20 Pac. 633.

³⁹ *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404.

⁴⁰ *Hannon v. Hounihan*, 85 Va. 429, 12 S. E. 157. And see *Johnstone v. Mappin*, 60 Law J. Ch. 241; *Fleener v. Fleener*, 29 Ind. 564; *Manning v. Riley*, 52 N. J. Eq. 39, 27 Atl. 810.

terest.⁴¹ An agreement for a lease of land would be a contract for an interest in land,⁴² but an agreement to pay for an examination of title with a view to purchasing land, or to furnish another with money with which to buy land would not be within the statute,⁴³ nor would

⁴¹ *Watters v. McGuigan*, 72 Wis. 155, 39 N. W. 382. An oral agreement between adjoining landowners, settling a dispute as to the boundary line between them, has been held not within the statute. *Jenkins v. Trager* (C. C.) 40 Fed. 726; *Archer v. Helm*, 69 Miss. 730, 11 South. 3; *Ferguson v. Crick* (Ky.) 23 S. W. 668; *Lecomte v. Toudouze*, 82 Tex. 208, 17 S. W. 1047, 27 Am. St. Rep. 870; *Grigsby v. Combs* (Ky.) 21 S. W. 37; *Jacobs v. Moseley*, 91 Mo. 457, 4 S. W. 135; *Sheets v. Sweeny*, 136 Ill. 336, 26 N. E. 648; *Atchison v. Pease*, 96 Mo. 566, 10 S. W. 159; *Hills v. Ludwig*, 46 Ohio St. 373, 24 N. E. 596. The contrary has also been held. *Camp v. Camp*, 59 Vt. 667, 10 Atl. 748. Such an agreement is within the statute, where the true boundary is known or fixed by a deed, and the purpose is to convey additional land by fixing the boundary at another place. *Weeks v. Martin*, 57 Hun. 589, 10 N. Y. Supp. 656; *Jenkins v. Trager* (C. C.) 40 Fed. 726; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. 1033; *Buckner v. Anderson*, 111 N. C. 572, 16 S. E. 424. Where the agreement is executed by taking possession. *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802. As to ratification of an agreement, see *CAVANAUGH v. JACKSON*, 91 Cal. 580, 27 Pac. 931; *Smith v. Schiele*, 93 Cal. 144, 28 Pac. 857. It has been held that where two execution creditors levy on the same land, and then agree that it shall be sold under one of the executions, and the proceeds divided, this is not a sale, but a compromise, and therefore not within the statute. *Mygatt v. Tarbell*, 78 Wis. 351, 47 N. W. 618. An agreement by an heir with his ancestor to release his expectations is within the statute. *Brands v. De Witt*, 44 N. J. Eq. 545, 14 Atl. 894, 6 Am. St. Rep. 909. So, also, is an agreement by a vendee under an executory contract of sale to surrender to his vendor his interest under the contract. *DOUGHERTY v. CATLETT*, 129 Ill. 431, 21 N. E. 932. An agreement, on the sale of land, for abatement of price in case of a deficiency, is not within the statute. *McGee v. Craven*, 106 N. C. 351, 11 S. E. 375; *Haviland v. Sammis*, 62 Conn. 44, 25 Atl. 394, 36 Am. St. Rep. 330. Nor is an agreement by which a party promises to pay another a certain sum per acre for all the land the latter shall examine and advise the former to buy. *Wilson v. Morton*, 85 Cal. 598, 24 Pac. 784. Agreement between adjoining landowners as to building of partition fence. *Rudisill v. Cross*, 54 Ark. 519, 16 S. W. 575, 26 Am. St. Rep. 57. Oral agreement to arbitrate as to land. *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685. Rent being an incident to the ownership of land, an assignment of rent must be in writing. *King v. Kaiser*, 3 Misc. Rep. 523, 23 N. Y. Supp. 21. Agreement to devise land. *Gould v. Mansfield*, 103 Mass. 408, 4 Am. Rep. 573; *Hale v. Hale*, 90 Va. 728, 19 S. E. 739; *In re Kessler's Estate*, 87 Wis. 660, 59 N. W. 129, 41 Am. St. Rep. 74; *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15, 38 Am. St. Rep. 379.

⁴² *Potter v. Arnold*, 15 R. I. 350, 5 Atl. 379. Assignment of a lease the unexpired term of which is more than a year. *Chicago Attachment Co. v. Davis Sewing-Mach. Co.* (Ill. Sup.) 25 N. E. 669, 28 N. E. 959; *Id.*, 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754.

⁴³ *Horner v. Frazier*, 65 Md. 1, 4 Atl. 133. An agreement by an agent to buy land in his own name for the benefit of his principal is not within the statute. *Baker v. Wainwright*, 36 Md. 336, 11 Am. Rep. 495. A parol partition is not within the statute. *Meacham v. Meacham*, 91 Tenn. 532, 19 S.

an agreement to transfer shares of stock in a railroad company or other corporation, which, though the company may own land, do not give any appreciable interest therein to the individual shareholders.⁴⁴

An agreement between landlord and tenant for the sale or surrender of fixtures placed upon the land by the tenant is not a sale of an interest in land.⁴⁵

According to the weight of authority, agreements for partnership dealings in land—that is, agreements under which the parties are to buy land for the purpose of selling it again, and dividing the profits or losses—are not within the statute.⁴⁶

Crops and Other Products of Land.

Probably the chief question of interest with reference to this subject relates to the sale of crops and other products of land. A distinction exists between what are called “fructus industriales,” such as crops of wheat, corn, and the like, which are obtained by labor and cultivation, and “fructus naturales,” such as growing grass, timber, ores in the ground, uncut ice, and the like, produced by the power of nature alone.

W. 757; *Wolf v. Wolf*, 158 Pa. 621, 28 Atl. 164. Contra: *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685. Nor is an agreement not to use land for a particular purpose. *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218.

⁴⁴ *Anson*, Cont. (4th Ed.) 61. But see *Driver v. Broad*, 4 Reports 411; *Id.* [1893] 1 Q. B. 744.

⁴⁵ *South Baltimore Co. v. Muhlbach*, 69 Md. 395, 16 Atl. 117, 1 L. R. A. 507; *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356; *Seoggin v. Slater*, 22 Ala. 687; *Heysham v. Dettre*, 89 Pa. 506. Nor are they within section 17. *Hallen v. Runder*, 1 C., M. & R. 266; *LEE v. GASKELL*, 1 Q. B. D. 700.

⁴⁶ *McElroy v. Swope* (C. C.) 47 Fed. 380; *Petrie v. Torrent*, 88 Mich. 43, 49 N. W. 1076; *Howell v. Kelly*, 149 Pa. 473, 24 Atl. 224; *Gardner v. Randell*, 70 Tex. 453, 7 S. W. 781; *Van Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. 283, 36 Am. St. Rep. 473; *Fountain v. Menard*, 53 Minn. 442, 55 N. W. 601, 39 Am. St. Rep. 617; *BATES v. BALD- COCK*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 Am. St. Rep. 133; *Case v. Seger*, 4 Wash. 492, 30 Pac. 646; *Coffin v. McIntosh*, 9 Utah, 315, 34 Pac. 247. But see *Young v. Wheeler* (C. C.) 34 Fed. 98; *Raub v. Smith*, 61 Mich. 543, 28 N. W. 678, 1 Am. St. Rep. 619; *Brosnan v. McKee*, 63 Mich. 454, 30 N. W. 107; *McKinnon v. McKinnon* (C. C.) 46 Fed. 713; *Clarke v. McAuliffe*, 81 Wis. 104, 51 N. W. 83. An agreement between A. and B. to work a stone quarry together, and divide the profits, if B. can purchase land, to be paid for by A., to whom the deed is to be made, is not for an interest in land. *Treat v. Hiles*, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858. An agreement by a person to purchase land with his own money, and divide with another, is within the statute. *Towle v. Wadsworth*, 147 Ill. 80, 30 N. E. 602; *Robbins v. Kimball*, 55 Ark. 414, 18 S. W. 457, 29 Am. St. Rep. 45; *Morton v. Nelson*, 145 Ill. 586, 32 N. E. 916; *Roughton v. Rawlings*, 88 Ga. 819, 16 S. E. 89; *Schultz v. Waldons*, 60 N. J. Eq. 71, 47 Atl. 187.

Fructus industriales are chattels, and not an interest in land.⁴⁷ *Fructus naturales*, on the contrary, are such an interest, and a contract for their sale, which contemplates the passing of the property before the severance, is within the statute;⁴⁸ but it is otherwise if the title is not to pass until after they are severed.⁴⁹

Licenses and Easements.

A mere license to enter upon land and do a particular act or series of acts—as in the case of a license to enter upon land and remove property sold to the licensee—is not an interest in land, within the statute. It is otherwise, however, where the right conferred is to enter upon lands and erect and maintain a dam thereon. This is more than a mere license; it is an easement. It is the transfer of an interest in the land.⁵⁰ A right of way is an interest in land.⁵¹

⁴⁷ *Evans v. Roberts*, 5 Barn. & C. 829; *Jones v. Flint*, 10 Adol. & El. 753; *Miller v. Baker*, 1 Metc. (Mass.) 27; *Whitmarsh v. Walker*, Id. 313; *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; *Ross v. Welch*, 11 Gray (Mass.) 235; *NORTHERN v. STATE*, 1 Ind. 113; *Graff v. Fitch*, 58 Ill. 373, 11 Am. Rep. 85; *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Marshall v. Ferguson*, 23 Cal. 65; *Purner v. Piercy*, 40 Md. 223, 17 Am. Rep. 591. But see, contra, *Kerr v. Hill*, 27 W. Va. 576.

⁴⁸ *Rodwell v. Phillips*, 9 Mees. & W. 501; *Crosby v. Wadsworth*, 6 East. 602; *White v. Foster*, 102 Mass. 375; *Howe v. Batchelder*, 49 N. H. 204; *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Harrell v. Miller*, 35 Miss. 700, 72 Am. Dec. 154; *Owens v. Lewis*, 46 Ind. 489, 15 Am. Rep. 295; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467; *HIRTH v. GRAHAM*, 50 Ohio St. 57, 33 N. E. 90, 19 L. R. A. 721, 40 Am. St. Rep. 641.

There is, however, much conflict, and in some states sales of growing trees, to be presently cut and removed by the purchaser, are held not to be within this section. *Bostwick v. Leach*, 3 Day (Conn.) 476; *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104; *Leonard v. Medford*, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449; *Cain v. McGuire*, 13 B. Mon. 340; cf. *Marshall v. Green*, 1 C. P. D. 35. See *Tiffany, Sales*, 46.

⁴⁹ *Smith v. Surman*, 5 B. C. 561; *Washbourn v. Burrows*, 11 East. 362; *Drake v. Wells*, 11 Allen (Mass.) 141; *Fletcher v. Livingston*, 153 Mass. 388, 26 N. E. 1001; *Banton v. Shorey*, 77 Me. 48; *Upton v. Holmes*, 51 Conn. 500; *Killmore v. Howlett*, 48 N. Y. 569.

⁵⁰ See *Mumford v. Whitney*, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60. In the case cited the authorities are collected and discussed at length. See, also, *Whitmarsh v. Walker*, 1 Metc. (Mass.) 313; *Johnson v. Wilkinson*, 139 Mass. 3, 29 N. E. 62, 52 Am. Rep. 698; *Taylor v. Waters*, 7 Taunt. 374; *Hayes v. Fine*, 91 Cal. 391, 27 Pac. 772; *Clanton v. Scruggs*, 95 Ala. 279, 10 South. 757. Easement in portion of the water from a ditch. *Dorris v. Sullivan*, 90 Cal. 279, 27 Pac. 216. Agreement between railroads for joint use of the right of way of one not within the statute. *Alabama G. S. R. Co. v. Railroad Co.*, 84 Ala. 570, 3 South. 286, 5 Am. St. Rep. 401. Nor is an agreement between telegraph companies for the use by one of the other's poles. *Farnsworth v. Telegraph Co.*, 53 Hun, 636, 6 N. Y. Supp. 735. A right to drain water over another's land is said to be an interest in land. *Deyo v. Ferris*, 22 Ill. App. 154, 24 Ill. App. 416.

⁵¹ *Bonelli v. Blakemore*, 66 Miss. 156, 5 South. 228, 14 Am. St. Rep. 550.

Statutes Varying from the English Statute.

The statute in some states varies from the English statute. In Illinois, for instance, it applies to any contract for the sale of lands, etc., or any interest in or concerning them, "for a longer term than one year."⁵²

SAME—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR.**43. The following rules may be mentioned:**

- (a) The agreement must be impossible of performance within the year.
- (b) In some jurisdictions the agreement must contemplate nonperformance by both parties within the year.
- (c) In a few jurisdictions this clause of the statute does not apply to agreements relating to land.

Possibility of Performance.

In order that an agreement may fall within this clause of the statute, the parties must contemplate that it shall not be performed within a year. The mere fact that it may not be, or is not, performed within the year, does not bring it within the statute. It must appear, it has been said, that "it is to be performed after the year."⁵³ Further than this, the agreement must be impossible of completion within a year. If, by any possibility, it is capable of being completed within a year, it is not within the statute, though the parties may intend, and though it is probable, that it will extend over a longer period, and though it does in fact so extend.

The oral contracts that have been held enforceable under this rule may be classified as follows:

(a) Agreements for the performance of an act on the happening of a contingency which may possibly happen within a year,—as in the case of agreements to do something on the marriage or death of a person, without further specification as to time; or upon the return of a ship, which may return within a year, though it does not in fact return until a longer time has elapsed; or upon the happening of any other event which may happen at any time.⁵⁴

⁵² Rev. St. Ill. c. 59, § 2.

⁵³ *PETER v. COMPTON*, 1 Smith, Lead. Cas. 335; *WARNER v. RAILWAY CO.*, 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495; *Bullock v. Turnpike Co.*, 85 Ky. 164, 3 S. W. 129; *Worley v. Sipe*, 111 Ind. 238, 12 N. E. 385; *Jones v. Pouch*, 41 Ohio St. 146; *Raynor v. Drew*, 72 Cal. 307, 13 Pac. 866; *Sarles v. Sharlow*, 5 Dak. 100, 37 N. W. 748; *Warren Chemical & Mfg. Co. v. Holbrook*, 118 N. Y. 586, 23 N. E. 908, 16 Am. St. Rep. 788; *Durham v. Hiatt*, 127 Ind. 514, 26 N. E. 401; *Sweet v. Lumber Co.*, 56 Ark. 629, 20 S. W. 514; *Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590; *Cole v. Singerly*, 60 Md. 348; *MacElree v. Wolfersberger*, 59 Kan. 105, 52 Pac. 69; *Richmond Union Pass. R. v. Railroad Co.*, 96 Va. 670, 32 S. E. 787.

⁵⁴ *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502; *Jilson v. Gilbert*, 26 Wis.

(b) Agreements for the continuous performance of acts until the happening of a contingency which may possibly happen within a year,—as in the case of agreements to render services, or to support a person, or to pay money from time to time, during a person's life, or until a person's marriage, or until the happening of any other event which may possibly happen within a year.⁵⁵ In this class may be placed contracts that may be terminated at any time on notice, and contracts to perform acts so long as the other party may need such performance.⁵⁶

(c) Agreements which, from their nature, and without mentioning any contingency, will be completely performed according to their terms and intention if a certain contingency shall happen within the year,⁵⁷—as in the case of agreements to forbear from personally doing certain acts for an indefinite time, or for a number of years, and which

637, 7 Am. Rep. 100; *Udipke v. Ten Broeck*, 32 N. J. Law, 105; *Anonymous*, 1 Salk. 280; *Blake v. Cole*, 22 Pick. (Mass.) 97; *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746; *Cole v. Singerly*, 60 Md. 348; *Thomas v. Armstrong*, 86 Va. 323, 10 S. E. 6, 5 L. R. A. 529; *Bartlett v. Mystic River Corp.*, 151 Mass. 433, 24 N. E. 780; *Clark v. Pendleton*, 20 Conn. 495. A promise by a man to marry when he recovers his health,—*McConahey v. Griffey*, 82 Iowa, 564, 48 N. W. 983,—or when he returns from a voyage from which he may or may not return within a year,—*Clark v. Pendleton*, 20 Conn. 495,—is not within the statute.

⁵⁵ *Kent v. Kent*, 62 N. Y. 560, 20 Am. Rep. 502; *Heath v. Heath*, 31 Wis. 223; *Carr v. McCarthy*, 70 Mich. 258, 38 N. W. 241; *Bell v. Hewitt's Ex'rs*, 24 Ind. 280; *Harper v. Harper*, 57 Ind. 547; *McGregor v. McGregor*, L. R. 21, Q. B. Div. 424; *Dresser v. Dresser*, 35 Barb. (N. Y.) 573; *Hutchinson v. Hutchinson*, 46 Me. 154; *Atchison, T. & S. F. R. Co. v. English*, 38 Kan. 110, 16 Pac. 82; *East Line & R. R. Co. v. Scott*, 71 Tex. 703, 10 S. W. 298, 10 Am. St. Rep. 804; *Stowers v. Hollis*, 83 Ky. 544; *Dailey v. Cain* (Ky.) 13 S. W. 424. Nor is an agreement to work for a company "for the term of five years, or so long as A. shall continue to be agent for the company." *Roberts v. Rockbottom Co.*, 7 Metc. (Mass.) 46. Nor an agreement to employ a person so long as he may be disabled from an injury which he has received. *East Tennessee, V. & G. R. Co. v. Staub*, 7 Lea (Tenn.) 397.

⁵⁶ *First Baptist Church v. Insurance Co.*, 19 N. Y. 305; *Roberts v. Rockbottom Co.*, 7 Metc. (Mass.) 46; *Walker v. Railroad Co.*, 26 S. C. 80, 1 S. E. 366; *Blake v. Voight*, 11 N. Y. Supp. 716; *Id.*, 134 N. Y. 69, 31 N. E. 256, 30 Am. St. Rep. 622; *Johnston v. Bowersock*, 62 Kan. 148, 61 Pac. 740. *Contra*: *Dobson v. Collis*, 1 H. & N. 81; *Blest v. Shoe Co.*, 97 Mo. 137, 70 S. W. 1081.

⁵⁷ An agreement by a railroad company to maintain cattle guards in consideration of a right of way is not within the statute, since it may cease to use the right of way before expiration of a year. *Arkansas M. R. Co. v. Whitley*, 54 Ark. 199, 15 S. W. 465, 11 L. R. A. 621. A parol contract of partnership, without any fixed time for continuance, and the business of which may be completed within a year, is not within the statute. *Jordan v. Miller*, 75 Va. 442; *Treat v. Hiles*, 68 Wis. 344, 32 N. W. 517, 60 Am. Rep. 858. It is otherwise if the partnership is to be continued beyond a year. *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280, 5 L. R. A. 623. And see, on the rule stated in the text, *Frazer v. Gates*, 118 Ill. 99, 1 N. E. 817; *Dailey v. Cain* (Ky.) 13 S. W. 424; *Great Western Turnpike Co. v. Shafer*, 57 App. Div. 331, 68 N. Y. Supp. 8.

would be fully performed if the promisor should die within the year;⁵⁸ or of agreements to educate or support a child until a certain age, at which he will not arrive for several years, or for an indefinite time, and which would be completely performed if the child should die within the year.⁵⁹ The agreement, to come within this class, must be such that it will be fully "performed" on the happening of the contingency, and not merely terminated. If it cannot be fully performed within the year, the fact that it may be terminated, or that further performance may be excused or rendered impossible, is not sufficient to take it out of the statute.⁶⁰

(d) Agreements of which performance may be required within a

⁵⁸ Under this rule it has been repeatedly held that an agreement not to carry on a certain business at a particular place was not within the statute, "because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his personal representatives, it would be fully performed if he died within the year." *DOYLE v. DIXON*, 97 Mass. 208, 93 Am. Dec. 80; *Lyon v. King*, 11 Metc. (Mass.) 411, 45 Am. Dec. 219; *Worthy v. Jones*, 11 Gray (Mass.) 168, 71 Am. Dec. 696; *Hill v. Jamieson*, 16 Ind. 125, 79 Am. Dec. 414; *Richardson v. Pierce*, 7 R. I. 330. And it is immaterial in such cases that the agreement specifies that the promisor is to forbear for a certain number of years. *DOYLE v. DIXON*, *supra*.

⁵⁹ *PETERS v. WESTBOROUGH*, 19 Pick. (Mass.) 364, 31 Am. Dec. 142; *Ellicott v. Turner*, 4 Md. 476; *Wooldridge v. Stern* (C. C.) 42 Fed. 311, 9 L. R. A. 129; *Taylor v. Deseve*, 81 Tex. 246, 16 S. W. 1008. See, also, *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289; *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 35 L. R. A. 512, 57 Am. St. Rep. 488; *Yellow Poplar Lumber Co. v. Rule*, 106 Ky. 455, 50 S. W. 685; *Sax v. Railway Co.*, 125 Mich. 252, 84 N. W. 314, 84 Am. St. Rep. 572; *Martin v. Batchelder*, 69 N. H. 360, 41 Atl. 83 [to keep house for year].

⁶⁰ *DOYLE v. DIXON*, *supra*. For this reason it has been held that an agreement to employ a boy for five years, and to pay his father certain sums at stated periods during that time, was within the statute; for though, by the death of the boy, the services which were the consideration of the promise would cease, and the promise therefore be determined, it would not be completely performed. *Hill v. Hooper*, 1 Gray (Mass.) 131. And see *Washington, A. & G. Steam Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 550 (Cf. *WARNER v. RAILWAY CO.*, 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495, criticising this case). And so, according to the weight of authority, an agreement for personal services for a period of more than one year is within the statute, for, on the death of either party, it would be terminated, and not fully performed. *WILLIAMS v. BEMIS*, 108 Mass. 91, 11 Am. Rep. 318; *Lee's Adm'r v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; *DAY v. RAILROAD CO.*, 51 N. Y. 583, 590; *Haynes v. Mason*, 30 Ill. App. 85; *William Butcher Steel Works v. Atkinson*, 68 Ill. 421, 18 Am. Rep. 560. In such cases, where the employé is discharged or quits the employment, after part performance, he may recover for what he has done, not on the contract, but on an implied assumpsit. Cases cited *supra*; *Baker v. Lauterbach*, 68 Md. 64, 11 Atl. 703. See, also, *post*, p. 95. If the term of employment is indefinite, the contract is not within the statute. See, also, *Dobson v. Collis*, 1 Hurl. & N. 81.

year if either party so chooses, though neither intends to require performance, and neither in fact requires it, until after expiration of the year.⁶¹

Part Performance within a Year.

Another rule, which is established in England and in most of our states, is that an agreement does not fall within the statute if that which one of the parties is to do is all to be performed within a year; in other words, the agreement must contemplate nonperformance by both parties within the year.⁶² A part performance by one of the parties, however, will not take the agreement out of the statute.⁶³

Some of the states, however, have refused to recognize this rule, and hold that, even though all that is to be done by one of the parties is to be fully done within a year, the agreement is nevertheless within the statute, if the other party's promise is not to be performed within the year;⁶⁴ and in these states no recovery can be had on the contract by the party who has performed his part, though he may sue on the promise implied on the part of the other party from his acceptance of the benefits of such performance.⁶⁵

It is held in Illinois that an agreement which is to be fully performed within the year, except for the mere payment of money, is not within

⁶¹ *Haussman v. Burnham*, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74; *Seddon v. Rosenbaum*, 85 Va. 928, 9 S. E. 326, 3 L. R. A. 337; *Walker v. Johnson*, 96 U. S. 424, 24 L. Ed. 834; *Connolly v. Giddings*, 24 Neb. 131, 37 N. W. 939. A contract intended to be performed within a year is not within the statute, though before the year expires it is extended six months. *Ward v. Matthews*, 73 Cal. 13, 14 Pac. 604; *Donovan v. Richmond*, 61 Mich. 467, 23 N. W. 516. A written lease for more than a year, but with less than a year to run, may be modified by parol. *Doherty v. Doe*, 18 Colo. 456, 33 Pac. 165.

⁶² *Donellan v. Read*, 3 Barn. & Adol. 899; *Horner v. Frazier*, 65 Md. 1, 4 Atl. 133; *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720; *Winters v. Cherry*, 78 Mo. 344; *Smalley v. Greene*, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; *Durfee v. O'Brien*, 16 R. I. 213, 14 Atl. 557; *Dant v. Head*, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369; *Berry v. Doremus*, 30 N. J. Law, 399; *Piper v. Foshier*, 121 Ind. 407, 23 N. E. 269; *Grace v. Lynch*, 80 Wis. 166, 49 N. W. 751; *Curtis v. Sage*, 35 Ill. 22; *Langan v. Iverson*, 78 Minn. 299, 80 N. W. 1051.

⁶³ See *Osborne v. Kimball*, 41 Kan. 187, 21 Pac. 163; *Shumate v. Farlow*, 125 Ind. 359, 25 N. E. 432; *Baker v. Codding*, 18 N. Y. Supp. 159; *Hartwell v. Young*, 67 Hun, 472, 22 N. Y. Supp. 486. In Wisconsin, part payment at or before the time of the contract will take it out of the statute. *Washburn v. Dosh*, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873.

⁶⁴ *Whipple v. Parker*, 29 Mich. 369; *Marcy v. Marcy*, 9 Allen (Mass.) 8; *Frary v. Sterling*, 99 Mass. 461; *Pierce v. Paine's Estate*, 28 Vt. 34; *Sheehy v. Adarene*, 41 Vt. 541, 98 Am. Dec. 623; *Lane v. Shackford*, 5 N. H. 130; *Montague v. Garnett*, 3 Bush (Ky.) 297; *Broadwell v. Getman*, 2 Denio (N. Y.) 87; *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Jackson Iron Co. v. Concentrating Co.*, 65 Fed. 298, 12 C. C. A. 636.

⁶⁵ *Whipple v. Parker*, 29 Mich. 369. See, also, post, p. 95, note 143; ante, p. 15.

the statute; the party to whom the money is payable having performed on his part.⁶⁶

Particular Contracts.

According to the weight of authority, this clause of the statute applies to promises to marry which are, by their terms, to be performed after the expiration of a year.⁶⁷

It has, however, been held in England, and in some of our states, that it does not apply to contracts relating to land.⁶⁸ Mr. Browne, in his work on the Statute of Frauds, takes the contrary view, and says that "it includes all those contracts which are of such duration, whatever be their subject-matter."⁶⁹ We have been unable to find any case in which the point seems to have been directly raised and decided in accordance with Mr. Browne's statement, but there are many cases which assume that the statute applies to agreements relating to land. For instance, some courts hold that a parol lease for a year, to commence on a future day, is within this clause of the statute.⁷⁰ In some of the states the statute in regard to contracts relating to land excepts from its operation "leases for a term not exceeding one year," and "contracts for the leasing for a period not longer than one year," and in some states it is held that such a statute does not apply to agreements for a lease for a year to commence in the future.⁷¹ A contract for services for one year, to commence at a future day, is within the statute,⁷² even though it is to commence on the day after the con-

⁶⁶ *Curtis v. Sage*, 35 Ill. 22; *Worden v. Sharp*, 56 Ill. 104.

⁶⁷ *DERBY v. PHELPS*, 2 N. H. 515; *Clark v. Pendleton*, 20 Conn. 495; *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443; *Nichols v. Weaver*, 7 Kan. 373; *Lewis v. Tappan*, 90 Md. 294, 45 Atl. 469, 47 L. R. A. 385.

⁶⁸ *HOLLIS v. EDWARDS*, 1 Vern. 159; *Fall v. Hazelregg*, 45 Ind. 576, 15 Am. Rep. 278; *Sobey v. Brisbee*, 20 Iowa, 105; *Young v. Dake*, 5 N. Y. 463, 55 Am. Dec. 356; *Wilson v. Martin*, 1 Denio (N. Y.) 602; *Railsback v. Walke*, 81 Ind. 409.

⁶⁹ *Browne*, *St. Frauds*, § 272.

⁷⁰ *Delano v. Montague*, 4 Cush. (Mass.) 42; *Wheeler v. Frankenthal*, 78 Ill. 124; *Comstock v. Ward*, 22 Ill. 248; *Olt v. Lohnas*, 19 Ill. 576; *Roberts v. Tennell*, 3 T. B. Mon. (Ky.) 247; *Wilson v. Martin*, 1 Denio (N. Y.) 602; *Atwood v. Norton*, 31 Ga. 507; *Strehl v. D'Evers*, 66 Ill. 77; *Jellett v. Rhode*, 43 Minn. 166, 45 N. W. 13, 7 L. R. A. 671; *White v. Holland*, 17 Or. 3, 3 Pac. 573; *Beiler v. Devall*, 40 Mo. App. 251; *White v. Levy*, 93 Ala. 484, 9 South. 164; *Cook v. Redman*, 45 Mo. App. 397.

⁷¹ *Whiting v. Ohlert*, 52 Mich. 462, 18 N. W. 219, 50 Am. Rep. 265; *Young v. Dake*, 5 N. Y. 463, 55 Am. Dec. 356; *McCroy v. Torey*, 66 Miss. 233, 5 South. 392, 2 L. R. A. 847; *Goldberg v. Lavinski*, 3 Misc. Rep. 607, 22 N. Y. Supp. 552. Contra, *Greenwood v. Strother*, 91 Ky. 482, 16 S. W. 138.

⁷² *Townsend v. Minford*, 48 Hun, 617, 1 N. Y. Supp. 565; *Lee's Adm'r v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; *Baker v. Coddington*, 18 N. Y. Supp. 159.

tract is made;⁷³ but it is otherwise if it is to commence on the day the contract is entered into.⁷⁴

SAME—FORM REQUIRED.

44. CONTENTS OF WRITING. The writing must show:

- (a) The names or descriptions of the parties.
- (b) The terms and subject-matter of the agreement.
- (c) The consideration (in most jurisdictions).

45. SEPARATE PAPERS. The writing may be on separate papers, provided they are all signed by the party to be charged or his agent, and that such as are not so signed are attached to or referred to in a signed paper.

46. BY WHOM SIGNED. In most jurisdictions only the signature of the party to be charged is required, but in some jurisdictions contracts consisting of mutual promises must be signed by both parties.

47. HOW SIGNED. The signature may be by mark or initial, and, unless the statute requires the name to be "subscribed," may be printed, and may be in any part of the writing.

48. AGENT TO SIGN. Where the signature is by agent, the agent must be a third person; but a person who acts as agent of one person in making the contract may act as agent of both in making the memorandum.

49. DELIVERY. The writing need not be delivered, except it be in form of a deed of land.

Form Merely Evidentiary.

As we shall presently show, the form required by this section of the statute does not go to the existence of the contract, but is evidentiary only. It is not, as in the case of a deed, an integral part of the contract itself. The contract exists, though it may not be clothed with the necessary form; and the effect of noncompliance with the provisions of the statute is simply that no action can be brought until the omission is made good, for the contract cannot be proved.

For this reason the memorandum or note may be made at any time between the formation of the contract and the commencement of an action thereon.⁷⁵ The writing need not be intended as a formal con-

⁷³ BILLINGTON v. CAHILL, 51 Hun, 132, 4 N. Y. Supp. 660.

⁷⁴ Cox v. Brewing Co., 53 Hun, 634, 6 N. Y. Supp. 841; Aiken v. Nogle, 47 Kan. 96, 27 Pac. 825.

⁷⁵ LERNED v. WANNEMACHER, 9 Allen (Mass.) 412; Gale v. Nixon, 6 Cow. (N. Y.) 445; Sheehy v. Fulton, 38 Neb. 691, 57 N. W. 395, 41 Am. St. Rep. 767. But not after the action is commenced. Bill v. Bament, 9 Mees. & W. 36; Lucas v. Dixon, 22 Q. B. Div. 357; BIRD v. MUNROE, 66 Me.

tract.⁷⁶ All that is required is written evidence of the agreement, and therefore the memorandum may consist of letters written by the party to be charged to his own agent, or to other third persons.⁷⁷ The memorandum may even consist of entries made by the party to be charged on his or his agent's books;⁷⁸ and entries in the records of a corporation may prove a contract by it.⁷⁹ So, also, resolutions of a city council may be a sufficient memorandum of a contract by it on behalf of the city.⁸⁰ A telegram may be a sufficient memorandum to satisfy the statute and charge the party by whom it is sent.⁸¹ Even recitals in a will have been held sufficient evidence of a contract by the testator to answer for the debts of his son.⁸²

A letter repudiating a verbal contract previously made by the writer may be sufficient.⁸³ Some of the courts seem to hold that the admission of a verbal contract in the pleadings in an action is a sufficient memorandum, but the decisions are no doubt based on the fact that the statute, not having been pleaded, is waived.⁸⁴ However this may be, the contrary is the rule.⁸⁵

337, 22 Am. Rep. 571. But see post, p. 83, note 84. It has been held in Illinois that a verbal agreement in consideration of marriage is not taken out of the statute by being reduced to writing after marriage. *McAnnulty v. McAnnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552.

⁷⁶ *Atwood v. Cobb*, 16 Pick. (Mass.) 230, 26 Am. Dec. 657.

⁷⁷ *GIBSON v. HOLLAND*, L. R. 1 C. P. 1; *Peabody v. Speyers*, 56 N. Y. 230; *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 536; *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800; *Cunningham v. Williams*, 43 Mo. App. 629; *Spangler v. Danforth*, 65 Ill. 152; *Moss v. Atkinson*, 44 Cal. 3; *North Platte M. & E. Co. v. Price*, 4 Wyo. 293, 33 Pac. 664.

⁷⁸ *Johnson v. Dodgson*, 2 Mees. & W. 653; *CLASON v. BAILEY*, 14 Johns. (N. Y.) 484; *Coddington v. Goddard*, 16 Gray (Mass.) 436.

⁷⁹ *Tufts v. Mining Co.*, 14 Allen (Mass.) 407; *McManus v. City of Boston*, 171 Mass. 152, 50 N. E. 607 (record of board of street commissioners); *Lamkin v. Manufacturing Co.*, 72 Conn. 57, 47 Atl. 593, 44 L. R. A. 786.

⁸⁰ *Marden v. Champlin*, 17 R. I. 423, 22 Atl. 938; *Argus Co. v. City of Albany*, 55 N. Y. 495, 14 Am. Rep. 296; *Greenville v. Waterworks Co.*, 125 Ala. 625, 27 South. 764. But see *Wilhelm v. Fagan*, 90 Mich. 6, 50 N. W. 1072.

⁸¹ *TREVOR v. WOOD*, 36 N. Y. 307, 93 Am. Dec. 511; *Marschall v. Vineyard Co.*, 1 Misc. Rep. 511, 21 N. Y. Supp. 468; *McElroy v. Buck*, 35 Mich. 434; *Little v. Dougherty*, 11 Colo. 103, 17 Pac. 292; *Everman v. Herndon* (Miss.) 11 South. 652; *Whaley v. Hinchman*, 22 Mo. App. 483.

⁸² *In re Hoyle* [1893] 1 Ch. 84.

⁸³ *Louisville Asphalt Varnish Co. v. Lorick*, 29 S. C. 533, 8 S. E. 8, 2 L. R. A. 212.

⁸⁴ *Gregg v. Garrett*, 13 Mont. 10, 31 Pac. 721; *Lauer v. Mercantile Inst.*, S. Utah, 305, 31 Pac. 397. See ante, p. 82, note 75; post, p. 96, notes 146, 147.

⁸⁵ *Taylor v. Allen*, 40 Minn. 433, 42 N. W. 292; *Holler v. Richards*, 102 N. C. 545, 9 S. E. 460; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Browning v. Berry*, 107 N. C. 231, 12 S. E. 195, 10 L. R. A. 726.

Showing as to Agreement.

The memorandum must show agreement on the part of the party sought to be charged; that is, it must show a concluded contract in so far as he is concerned.⁸⁶ In most jurisdictions, where a written proposal has been made by the party sought to be charged, an acceptance by the other party may be established by parol evidence.⁸⁷

Showing as to the Parties.

The memorandum of the contract must show who are the parties to it; not only who is the promisor, but who is the promisee as well. Thus, where a person promised that he would answer for the debt of a third person, and signed a memorandum to that effect, but the memorandum did not show the name of the promisee, it was held insufficient. "No document," it was said, "can be an agreement or memorandum of one, which does not show on its face who the parties making the agreement are."⁸⁸

A party need not be named, if he is sufficiently described; and the description will let in parol evidence to show his identity.⁸⁹ Where A. in his own name enters into a contract as the agent of B., the other party to the contract may show by parol evidence that he really

⁸⁶ *Coe v. Tough*, 116 N. Y. 273, 22 N. E. 550.

⁸⁷ *Reuss v. Picksley*, L. R. 1 Exch. 342; *Farwell v. Lowther*, 18 Ill. 252; *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118; *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. 188; *Himrod Furnace Co. v. Railroad Co.*, 22 Ohio St. 451.

⁸⁸ *Williams v. Lake*, 2 El. & El. 349. And see *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *McElroy v. Seery*, 61 Md. 389, 48 Am. Rep. 110; *Sherburne v. Shaw*, 1 N. H. 157, 8 Am. Dec. 47; *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366; *McGovern v. Hern*, 153 Mass. 308, 26 N. E. 861, 10 L. R. A. 815, 25 Am. St. Rep. 632; *Lewis v. Wood*, 153 Mass. 321, 26 N. E. 862, 11 L. R. A. 143; *Coombs v. Wilkes* [1891] 3 Ch. 77; *Watt v. Cranberry Co.*, 63 Iowa, 730, 18 N. W. 898. A memorandum of a sale of goods, which does not clearly show which party is vendor and which vendee, is not sufficient. *Frank v. Eltringham*, 65 Miss. 281, 3 South. 655; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509. But see *Newell v. Radford*, L. R. 3 C. P. 52; *SALMON FALLS MFG. CO. v. GODDARD*, 14 How. (U. S.) 446, 14 L. Ed. 493; *Thornton v. Kelly*, 11 R. I. 498. An auctioneer's memorandum of a sale of land must show who the vendor is. *O'Sullivan v. Overton*, 56 Conn. 102, 14 Atl. 300; *Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. 1044, 11 L. R. A. 97, 19 Am. St. Rep. 514.

⁸⁹ *Sale v. Lambert*, 18 Eq. 1; *Fessenden v. Mussey*, 11 Cush. (Mass.) 127; *Lerned v. Johns*, 9 Allen (Mass.) 419; *Catling v. King*, 5 Ch. Div. 660; *Thornton v. Kelly*, 11 R. I. 498; *Violet v. Powell's Adm'r*, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548; *Dykens v. Townsend*, 24 N. Y. 57; *Jones v. Dow*, 142 Mass. 130, 7 N. E. 539. Where a defendant had directed his factor to sell goods, and to use a fictitious name to represent him as seller, and the fictitious name was inserted in the factor's memorandum, parol evidence was held admissible to show that the name represented defendant. *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. But see *Minard v. Mead*, 7 Wend. (N. Y.) 68; *Newcomb v. Clark*, 1 Denio (N. Y.) 226.

contracted with B., who has been described in the memorandum in the character of A.⁹⁰

Showing as to Terms.

The memorandum must show all the terms of the agreement. Where a contract does not fall within the statute, the parties may, at their option, put their agreement in writing, or may contract orally, or put some of the terms in writing, and arrange others orally. In the latter case, although that which is written cannot be varied by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract. Where, however, a contract falls within the statute, all its terms must be in writing.⁹¹ Parol evidence of terms not appearing in the writing would invalidate the contract by showing that it was different from what appears in the memorandum.

It is said in a Massachusetts case that: "The contract or memorandum must express the substance of the contract with reasonable certainty, either by its own terms or by reference to some other deed, record, or other matter from which it can be ascertained with like reasonable certainty. The statute is intended as a shield. No

⁹⁰ *Trueman v. Loder*, 11 Adol. & El. 589; *Dykens v. Townsend*, 24 N. Y. 57; *Sanborn v. Flagler*, 9 Allen (Mass.) 477; *Hargrove v. Adcock*, 111 N. C. 166, 16 S. E. 16; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Violett v. Powell's Adm'r*, 10 B. Mon. (Ky.) 347, 52 Am. Dec. 548; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355. The agent, however, so contracting cannot show by parol that he did not intend to bind himself. *Higgins v. Senior*, 8 Mees. & W. 834; *Waring v. Mason*, 18 Wend. (N. Y.) 425.

⁹¹ *May v. Ward*, 134 Mass. 127; *Drake v. Seaman*, 97 N. Y. 230; *Messmore v. Cunningham*, 78 Mich. 623, 44 N. W. 145; *Lester v. Heidt*, 86 Ga. 226, 12 S. E. 214, 10 L. R. A. 108; *Ringer v. Holtzelaw*, 112 Mo. 519, 20 S. W. 800; *Fry v. Platt*, 32 Kan. 62, 3 Pac. 781; *Willy v. Robert*, 27 Mo. 388; *O'DONNELL v. LEEMAN*, 43 Me. 158, 69 Am. Dec. 54; *Kriete v. Myer*, 61 Md. 558. A memorandum of a contract to sell land, which does not mention the purchase price nor the times of payment, is insufficient. *Webster v. Brown*, 67 Mich. 328, 34 N. W. 676; *Gault v. Stormount*, 51 Mich. 636, 17 N. W. 214; *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 356. But see *Ellis v. Bray*, 79 Mo. 227. So, also, with a memorandum of a sale of goods omitting terms of payment. *Elliot v. Barrett*, 144 Mass. 256, 10 N. E. 820. A memorandum setting out the terms of payment under a contract of sale as "one-third cash, and notes to be executed for the balance," is not sufficient, as there is nothing to show the number of notes to be given, interest thereon, or date of payment. *Nelson v. Improvement Co.*, 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116. In a memorandum of a contract for the sale of lands or goods the price must be stated. *Phelps v. Stillings*, 60 N. H. 505; *Watt v. Cranberry Co.*, 63 Iowa. 730, 18 N. W. 898; *Phillips v. Adams*, 70 Ala. 373; *Ide v. Stanton*, 15 Vt. 686, 40 Am. Dec. 698. But failure to state the price, where an adequate price was in fact paid, was held not to render the memorandum insufficient. *Sayward v. Gardner*, 5 Wash. 247, 31 Pac. 761.

particular forms are required, and it looks at the substance of the contract. It requires a note or memorandum of the contract, not a detail of all its particulars."⁹² While this is no doubt sound law, it must not be taken to mean that any of the terms of the contract can be shown by parol.

Showing as to Subject-Matter.

The writing must also show the subject-matter, at least to such an extent that it can be identified.⁹³ Parol evidence is admitted to identify the subject-matter to which the writing refers; as, for instance, to identify a house described in the writing as a "house on Church street," or property described as "your half, E. B. wharf, and premises this day agreed upon between us."⁹⁴

Showing as to Consideration.

Not only must a consideration for the promise sought to be enforced exist, but it must, according to the rulings in England, and probably in most of the states, expressly or impliedly appear in the memorandum. As stated by Lord Ellenborough in the leading case on this point, the reason for the rule is because the word "agreement," used in the statute, "is not satisfied unless there be a con-

⁹² *Atwood v. Cobb*, 16 Pick. (Mass.) 230, 26 Am. Dec. 657. And see *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. 41; *Frazer v. Howe*, 106 Ill. 563; *Farwell v. Mather*, 10 Allen (Mass.) 322, 87 Am. Dec. 641; *Gordon v. Avery*, 102 N. C. 532, 9 S. E. 486.

⁹³ *Whelan v. Sullivan*, 102 Mass. 204; *Beekman v. Fletcher*, 48 Mich. 555, 12 N. W. 849; *Tice v. Freeman*, 30 Minn. 389, 15 N. W. 674; *King v. Wood*, 7 Mo. 389.

⁹⁴ *Mead v. Parker*, 115 Mass. 413; *Tallman v. Franklin*, 14 N. Y. 584; *Ryan v. United States*, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447; *Mellon v. Davison*, 123 Pa. 298, 16 Atl. 431; *Henderson v. Perkins*, 94 Ky. 207, 21 S. W. 1035; *Dougherty v. Chesnutt*, 86 Tenn. 1, 5 S. W. 444; *Lente v. Clarke*, 22 Fla. 515, 1 South. 149; *Cossitt v. Hobbs*, 56 Ill. 231; *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 536; *Quinn v. Champagne*, 38 Minn. 322, 37 N. W. 451; *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Humbert v. Brisbane*, 25 S. C. 506; *Oliver v. Hunting*, 44 Ch. Div. 205; *Francis v. Barry*, 69 Mich. 311, 37 N. W. 353. A memorandum is not sufficient where it merely describes it as "an estate on A. street, owned by B.," and the evidence shows that B. owned two estates on that street. *DOHERTY v. HILL*, 144 Mass. 465, 11 N. E. 581. And see *Jones v. Tye*, 93 Ky. 390, 20 S. W. 388; *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 25 South. 709, 77 Am. St. Rep. 46. "Your land," in a letter to the alleged vendor is not sufficient. *Taylor v. Allen*, 40 Minn. 433, 42 N. W. 292. And see *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379. A memorandum that P. shall have the land "of which he is now in possession" has been held sufficient. *Phillips v. Swank*, 120 Pa. 76, 13 Atl. 712, 6 Am. St. Rep. 691. And see *Falls of Neuse Mfg. Co. v. Hendricks*, 106 N. C. 485, 11 S. E. 568. An agreement for the sale of a designated number of acres "in" a specified larger tract of land is not sufficient. *Brockway v. Frost*, 40 Minn. 155, 41 N. W. 411. And see *Repetti v. Maisak*, 6 Mackey, 366.

sideration, which consideration, forming part of the agreement, ought, therefore, to have been shown; and the promise is not binding by the statute unless the consideration which forms part of the agreement be also stated in writing."⁹⁵ Other courts have refused to recognize this doctrine, though in some of these cases the statute used the word "promise" instead of "agreement."⁹⁶ Most of the states, however, have put this question at rest by statutory provisions expressly declaring it necessary⁹⁷ or unnecessary⁹⁸ to express the consideration in the writing. Even where the statute provides that the consideration need not be expressed, it must be expressed if it is executory, and modifies the promise; for in such case it is a term of the contract.⁹⁹

Separate Papers.

The memorandum may consist in any number of letters, telegrams, or other pieces of paper.¹⁰⁰ The papers, however, must be connected, consistent, and complete.

⁹⁵ *Wain v. Warlters*, 5 East, 10. And see *Sears v. Brink*, 3 Johns. (N. Y.) 210, 3 Am. Dec. 475; *Taylor v. Pratt*, 3 Wis. 674; *Thompson v. Blanchard*, 3 N. Y. 335; *Ordeman v. Lawson*, 49 Md. 135; *Sloan v. Wilson*, 4 Har. & J. (Md.) 322, 7 Am. Dec. 672; *Buckley v. Beardslee*, 5 N. J. Law, 572, 8 Am. Dec. 620; *Gregory v. Logan*, 7 Blackf. (Ind.) 112; *Ellison v. Water Co.*, 12 Cal. 542; *Hargroves v. Cooke*, 15 Ga. 321. It is sufficient if the consideration can be gathered from the entire contract. The words "value received" have been held enough. *Watson's Ex'rs v. McLaren*, 19 Wend. (N. Y.) 557; *D. M. Osborne & Co. v. Baker*, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55; *Ede- lin v. Gough*, 5 Gill (Md.) 103; *Emerson v. C. Aultman & Co.*, 69 Md. 125, 14 Atl. 671; *Smith v. Northrup*, 80 Hun, 65, 29 N. Y. Supp. 851. The presence of a seal has been held a sufficient recital of the consideration. *Johnston v. Wadsworth*, 24 Or. 494, 34 Pac. 13; *Smith v. Northrup*, supra.

⁹⁶ *Packard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 123; *Brittain v. Aingier*, 48 N. H. 422; *Gillighan v. Boardman*, 29 Me. 79; *Patchin v. Swift*, 21 Vt. 292; *Shively v. Black*, 45 Pa. 345; *Sage v. Wilcox*, 6 Conn. 81; *Violett v. Pat- ton*, 5 Cranch, 151, 3 L. Ed. 61 (construing the Virginia statute); *Reed v. Evans*, 17 Ohio, 128; *Steadman v. Guthrie*, 4 Metc. (Ky.) 147; *Taylor v. Ross*, 3 Yerg. (Tenn.) 330; *Adkins v. Watson*, 12 Tex. 199; *Halsa v. Halsa*, 8 Mo. 303; *How v. Kamball*, 2 McLean, 103, Fed. Cas. No. 6,748; *Brown v. Fowler*, 70 N. H. 211, 47 Atl. 412.

⁹⁷ It is declared necessary in Alabama, Minnesota, Nevada, and Oregon. A guaranty of a note, written by a third person on the note before delivery, need express no consideration, since the guaranty requires no other consideration than that which the note on its face implies to have passed between the original parties. *Moses v. Bank*, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743 (under Alabama statute). Contra: *Commercial Nat. Bank v. Smith*, 107 Wis. 574, 83 N. W. 766. It is otherwise if the guaranty is written after the note has been delivered and taken effect as a contract. *Moses v. Bank*, supra.

⁹⁸ It is declared unnecessary in Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey, and Virginia. See *HAYES v. JACKSON*, 159 Mass. 451, 34 N. E. 683.

⁹⁹ See *Drake v. Seaman*, 97 N. Y. 230.

¹⁰⁰ *Reuss v. Picksley*, L. R. 1 Exch. 342; *Ryan v. United States*, 136 U. S.

It is generally held that the connection between various papers must be made out from the papers themselves,¹⁰¹ and that it cannot be shown by parol evidence.¹⁰² But, if one paper is referred to in another, it may be identified by parol evidence.¹⁰³

To say that the papers must be consistent is merely to reiterate what was said in treating of offer and acceptance.

Signature.

It is essential that the memorandum be signed by "the party to be charged," or some other person by him lawfully authorized.¹⁰⁴ As to whether it must have been signed by the party seeking to enforce it, there is some conflict. Probably all courts hold that it need not be so signed if the consideration given by the party suing is executed. The conflict is where there are mutual promises. Some

83, 10 Sup. Ct. 913, 34 L. Ed. 447; *Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 536; *Lee v. Cherry*, 85 Tenn. 707, 4 S. W. 835, 4 Am. St. Rep. 800; *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345; *Gulf, C. & S. F. Ry. Co. v. Settegast*, 79 Tex. 256, 15 S. W. 228; *Bayne v. Wiggins*, 139 U. S. 210, 11 Sup. Ct. 521, 35 L. Ed. 144; *Olson v. Sharpless*, 53 Minn. 91, 55 N. W. 125.

¹⁰¹ If all the separate papers are signed, reference in the one to the other need not be made, if by inspection and comparison it appears that they form part of the same transaction. *Thayer v. Luce*, 22 Ohio St. 62. See, also, *Brewer v. Horst & Lachmund Co.*, 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240. But see *Potter v. Peters*, 72 L. J. Rep. 624.

¹⁰² Where a person issued a prospectus of illustrations of Shakspeare, to be published on terms of subscription therein set out, and A. entered his name in a book entitled "Shakspeare Subscribers, their Signatures," in the publisher's shop, and afterwards refused to subscribe, it was held that there was no sufficient reference to connect the subscription book with the prospectus, so as to make a memorandum. *Boydell v. Drummond*, 11 East, 142. And see *Peirce v. Corf*, L. R. 9 Q. B. 210; *Taylor v. Smith*, 61 Law J. Q. B. 331; *Morton v. Dean*, 13 Metc. (Mass.) 385; *O'DONNELL v. LEEMAN*, 43 Me. 158, 69 Am. Dec. 54; *Doughty v. Manhattan Brass Co.*, 101 N. Y. 644, 4 N. E. 747; *North v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879; *Oliver v. Insurance Co.*, 82 Ala. 417, 2 South. 445; *Orne v. Cook*, 31 Ill. 238; *Duff v. Hopkins* (D. C.) 33 Fed. 599; *Coombs v. Wilkes* [1891] 3 Ch. 77; *Andrew v. Babcock*, 63 Conn. 109, 26 Atl. 715. A contract for the sale of land, containing no description of it, was held insufficient, though there was a description of land on the back of the paper, there being no words to connect the indorsement with the contract. *Wilstach v. Heyd*, 122 Ind. 574, 23 N. E. 903. Reciprocal wills not referring to each other. *Hale v. Hale*, 90 Va. 728, 19 S. E. 739.

¹⁰³ *Long v. Miller*, 4 C. P. Div. 459; *Oliver v. Insurance Co.*, 82 Ala. 417, 2 South. 445; *BECKWITH v. TALBOT*, 95 U. S. 289, 24 L. Ed. 496; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. 41; *Werk v. Cowbick*, 81 Ill. 317; *Lee v. Butler*, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466.

¹⁰⁴ *Sanborn v. Sanborn*, 7 Gray (Mass.) 142; *Cloud v. Greasley*, 125 Ill. 312, 17 N. E. 826; *Rafferty v. Lounge*, 63 N. H. 54; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509; *Guthrie v. Anderson*, 47 Kan. 383, 28 Pac. 164, 30 Pac. 459; *McElroy v. Seery*, 61 Md. 389, 48 Am. Rep. 110; *Moore v. Powell*, 6 Tex. Civ. App. 43, 25 S. W. 472. Cf. *Gardels v. Klocke*, 36 Neb. 493, 54 N. W. 834.

courts hold in these cases that the contract, not being enforceable against the party who has not signed it, is void for want of mutuality.¹⁰⁵ Most courts hold that the statute is satisfied if the memorandum is signed by the party against whom it is sought to be enforced.¹⁰⁶

The signature may be by mark¹⁰⁷ or initials,¹⁰⁸ or it may be printed, stamped, or engraved.¹⁰⁹ Nor need the signature be placed at the end of the document as a formal signature. If the name of the party to be charged appear in the memorandum, so as to be applicable to the whole substance of the writing, and was written by himself, or by his authorized agent, it is immaterial where the name appears, whether at the top or at the bottom, or whether it is merely mentioned in the body of the memorandum.¹¹⁰ Where, however, the statute requires the memorandum to be "subscribed," it has been held that there must be a formal signature at the bottom of the memorandum.¹¹¹

A party to a contract may sign a rough draft of its terms, and

¹⁰⁵ *Wilkinson v. Heavenrich*, 38 Mich. 574, 20 N. W. 100, 56 Am. Rep. 708; *Corbitt v. Gaslight Co.*, 3 Or. 405, 25 Am. Rep. 341; *Krohn v. Banta*, 68 Ind. 277; *Thomas' Ex'x v. Trustees*, 3 A. K. Marsh. (Ky.) 208; *Stiles v. McLellan*, 6 Colo. 89.

¹⁰⁶ *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Reuss v. Pickstep*, L. R. 1 Exch. 342; *CLASON v. BAILEY*, 14 Johns. (N. Y.) 487; *Old Colony R. Co. v. Evans*, 6 Gray (Mass.) 25, 66 Am. Dec. 394; *Love v. Welch*, 97 N. C. 200, 2 S. E. 242; *Williams v. Robinson*, 73 Me. 189; *Oliver v. Insurance Co.*, 32 Ala. 417, 2 South. 445; *J. I. Case Threshing Mach. Co. v. Smith*, 10 Or. 381, 18 Pac. 641; *Smith's Appeal*, 69 Pa. 481; *Anderson v. Harold*, 10 Ohio, 300; *Ives v. Hazard*, 4 R. I. 81, 37 Am. Dec. 500; *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. 979, 7 L. R. A. 87; *Perkins v. Hadsell*, 50 Ill. 217; *Gartrell v. Stafford*, 12 Neb. 545, 11 N. W. 732, 41 Am. Rep. 707; *Cunningham v. Williams*, 48 Mo. App. 620; *Scott v. Glenn*, 97 Cal. 513, 32 Pac. 383; *Jones v. Davis*, 48 N. J. Eq. 493, 21 Atl. 1035.

¹⁰⁷ *Baker v. Denning*, 8 Adel. & E. 94; *Zacharie v. Franklin*, 12 Pet. 151, 9 L. Ed. 1035; *Brown v. Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

¹⁰⁸ *Sandern v. Flagler*, 9 Allen (Mass.) 254; *SALMON FALLS MFG. CO. v. GODDARD*, 14 How. 447, 14 L. Ed. 493; *Palmer v. Stephens*, 1 Denio (N. Y.) 471.

¹⁰⁹ *Bennett v. Brummitt*, L. R. 3 C. P. 30; *Drury v. Young*, 38 Md. 346, 42 Am. Rep. 343; *Schneider v. Norris*, 2 Maule & S. 286; *Weston v. Myers*, 33 Ill. 424.

¹¹⁰ *Davis v. Shields*, 26 Wend. (N. Y.) 341, 353; *Coddington v. Goddard*, 16 Gray (Mass.) 444; *Caton v. Caton*, L. R. 2 H. L. 127; *CLASON v. BAILEY*, 14 Johns. (N. Y.) 484; *Boardman v. Spooner*, 13 Allen (Mass.) 358, 39 Am. Dec. 196; *Penniman v. Hartshorn*, 13 Mass. 87; *EVANS v. HOARE* [1822] 1 Q. B. 600; *Braley v. Kelly*, 25 Minn. 100; *Tingley v. Boom Co.*, 3 Wash. St. 644, 32 Pac. 737, 33 Pac. 1055.

¹¹¹ *Davis v. Shields*, 26 Wend. (N. Y.) 341. And see *James v. Patton*, 6 N. Y. 9, 55; *Champlin v. Parrish*, 11 Paige (N. Y.) 405.

acknowledge his signature when the draft has been corrected, and the contract is actually concluded.¹¹²

Signature by Agent.

The memorandum may be signed by the duly-authorized agent of the party to be charged.¹¹³ The agent must not be the other contracting party, but some third person, for to allow otherwise would be to open the door for the fraud which the statute was intended to prevent.¹¹⁴

In cases of sales at auction, the auctioneer, acting only as such, is the competent agent of both parties, and his memorandum is binding on both. He is the agent of the vendor by virtue of his employment, and he is made the agent of the vendee by the act of the latter in giving him his bid, and receiving the announcement that the property is knocked off to him as purchaser.¹¹⁵ This, however, does not apply where the vendor is himself the auctioneer.¹¹⁶ The memorandum must be made at the time of the sale.¹¹⁷

As we have already seen, if the agent signs his own name, the other party to the contract may show by parol that he really contracted with the principal.¹¹⁸ The agent, however, after making the contract in his own name, cannot show by parol that he is not the real party to the contract.¹¹⁹

Unless the statute expressly so requires, the authority of the agent need not be in writing.¹²⁰ In some states, however, the statute does so require in the case of contracts relating to land.¹²¹

¹¹² *Stewart v. Eddowes*, L. R. 9 C. P. 314.

¹¹³ *Heffron v. Armsby*, 61 Mich. 505, 28 N. W. 672; *Tynan v. Dullnig* (Tex. Civ. App.) 25 S. W. 465. Signature by broker as agent is sufficient. *Williams v. Woods*, 16 Md. 220.

¹¹⁴ *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295. And see *Sherman v. Brandt*, L. R. 6 Q. B. 720; *Farebrother v. Simmons*, 5 Barn. & Ald. 333; *Carlisle v. Campbell*, 76 Ala. 247; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343.

¹¹⁵ *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295; *Trustees of First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Morton v. Dean*, 13 Metc. (Mass.) 385; *McBrayer v. Cohen* (Ky.) 18 S. W. 123; *Meadows v. Meadows*, 3 McCord (S. C.) 458, 15 Am. Dec. 645; *Singstack's Ex'rs v. Harding*, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669. See *Wyckoff v. Mickle* (N. J. Ch.) 20 Atl. 214.

¹¹⁶ *Bent v. Cobb*, 9 Gray (Mass.) 397, 69 Am. Dec. 295.

¹¹⁷ *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Horton v. McCarty*, 53 Me. 394.

¹¹⁸ *Ante*, p. 84.

¹¹⁹ *Higgins v. Senior*, 8 Mees. & W. 834; *Waring v. Mason*, 18 Wend. (N. Y.) 425.

¹²⁰ *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345; *Kennedy v. Ehlen*, 31 W. Va. 540, 8 S. E. 398; *Watson v. Sherman*, 84 Ill., at page 267. But see *Simpson v. Com.*, 89 Ky. 412, 12 S. W. 630.

¹²¹ *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360; *Gerhart v. Peck*, 42 Mo. App. 644; *Castner v. Richardson*, 18 Colo. 496, 33 Pac. 163; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416.

Delivery.

The memorandum, being required merely as evidence of the contract, need not be delivered.¹²² Nondelivery is only material in so far as it may tend to show that no final agreement has been reached. It is held, however, that a deed of land must be delivered to constitute a sufficient memorandum.¹²³ A delivery of the deed in escrow is sufficient.¹²⁴

SAME—EFFECT OF NONCOMPLIANCE.

50-51. Failure to comply with the requirement of the fourth section does not render one contract void, but merely excludes parol proof, and renders it unenforceable.

The English statute, which has been followed by the statutes of most of the states, does not declare that the contracts, if entered into orally, shall be void, but simply that "no action shall be brought" on them. The statute does not go to the existence of the contract, but merely makes written evidence necessary to establish it. The contract is not void, but simply unenforceable by suit.¹²⁵

Though the contract cannot, for this reason, be sued upon successfully, it is available for some purposes. If it has been fully performed, the courts will recognize and protect the rights of the parties acquired under it. And if it has been performed by one of the parties by payment of the consideration he will not be allowed to recover back what he has paid, where the other party is willing to perform on his part.¹²⁶

¹²² *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343.

¹²³ *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22; *Callanan v. Chapin*, 158 Mass. 113, 32 N. E. 941; *Swain v. Burnette*, 89 Cal. 564, 26 Pac. 1093; *Day v. Lacasse*, 85 Me. 242, 27 Atl. 124. And see *Kopp v. Reiter*, 146 Ill. 437, 34 N. E. 942, 22 L. R. A. 273, 37 Am. St. Rep. 156. But see *Johnston v. Jones*, 85 Ala. 286, 4 South. 748.

¹²⁴ *Johnston v. Jones*, 85 Ala. 286, 4 South. 748; *Cannon v. Handley*, 72 Cal. 133, 13 Pac. 315; *Lewis v. Prather* (Ky.) 21 S. W. 538. But see *Ducett v. Wolf*, 81 Mich. 311, 45 N. W. 829.

¹²⁵ *Leroux v. Brown*, 12 C. B. 801; *Townsend v. Hargraves*, 118 Mass. 325; *Montague v. Garnett*, 3 Bush (Ky.) 297; *Baker v. Lauterbach*, 68 Md. 64, 11 Atl. 703; *Crane v. Gough*, 4 Md. 316; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Brakefield v. Anderson*, 87 Tenn. 206, 10 S. W. 360; *Browning v. Parker*, 17 R. I. 183, 20 Atl. 835; *Ohio & M. R. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812; *Montgomery v. Edwards*, 46 Vt. 151, 14 Am. Rep. 618; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *La Du-King Mfg. Co. v. La Du*, 36 Minn. 443, 31 N. W. 938; *BIRD v. MUNROE*, 66 Me. 337, 22 Am. Rep. 571. The courts often use the word "void" carelessly, and the fact that they speak of a contract as void cannot always be relied on.

¹²⁶ *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351; *Coughlin v. Knowles*, 7 Metc. (Mass.) 57; *Sims v. Hutchins*, 8 Smedes & M. (Miss.) 331, 47 Am. Dec.

In some states, however, the statute declares that the contract "shall be void" unless in writing.¹²⁷ In these states it seems that the statute goes to the existence of the contract, and renders it absolutely void. In a Massachusetts case, however, in construing the section of the statute of that state relating to contracts for the sale of goods, which declared that no such contract should be held to be good and "valid," it was held that it was not the intention of the legislature to declare such contracts void, but simply to prevent oral proof.¹²⁸

Further illustration of the rule that a contract which does not comply with the statute is not void, but simply unenforceable, is found in the mode in which courts of equity deal with such contracts, to be presently explained.

Part Performance.

At law, unless the statute so provides, part performance of a verbal contract does not take it out of the operation of the statute;¹²⁹ but it is otherwise in equity.

Same—In Equity.

A court of equity will dispense with the written evidence required by the statute when one of the parties has under certain conditions performed his part of the contract.

The equitable rule has sometimes been limited to contracts relating to an interest in land;¹³⁰ but "it is probably more accurate to

90; Shaw v. Shaw, 6 Vt. 69; HAWLEY v. MOODY, 24 Vt. 605. And see Lane v. Shackford, 5 N. H. 130; Richards v. Allen, 17 Me. 296; Bedinger v. Whittamore, 2 J. J. Marsh. (Ky.) 563; Collier v. Coates, 17 Barb. (N. Y.) 473; McKinney v. Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; Nelson v. Improving Co., 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116; Butler v. Dinan, 65 Hun, 620, 19 N. Y. Supp. 950. But see Hartwell v. Young, 67 Hun, 472, 22 N. Y. Supp. 486, in which it was held that a person orally employed for a longer period than a year may abandon the contract without fault on his employer's part, and recover for the services rendered; post, p. 553.

¹²⁷ See Popp v. Swanke, 68 Wis. 364, 31 N. W. 916. Such are the statutes of Alabama, California, Michigan, Nevada, New York, Oregon, Wisconsin.

¹²⁸ Townsend v. Hargraves, 118 Mass. 325.

¹²⁹ Chicago Attachment Co. v. Sewing-Mach. Co., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754; Henry v. Wells, 48 Ark. 485, 3 S. W. 637; Wheeler v. Frankenthal, 78 Ill. 124; Nally v. Reading, 107 Mo. 350, 17 S. W. 978; Brown v. Pollard, 89 Va. 696, 17 S. E. 6. The statute does expressly provide in Iowa, Alabama, and probably in other states, that certain acts of part performance shall take the contract out of the statute. Louisville & N. R. Co. v. Philyaw, 94 Ala. 463, 10 South. 83; Price v. Lien, 84 Iowa, 590, 51 N. W. 52.

¹³⁰ Brittain v. Rossiter, 11 Q. B. Div. 123. And see Osborne v. Kimball, 41 Kan. 187, 21 Pac. 163; McElroy v. Ludlum, 32 N. J. Eq. 828. As to contracts in consideration of marriage, see ante, p. 80. As to contracts not to be performed within a year, see ante, p. 72.

say that the doctrine of part performance applies to all cases in which a court of equity would entertain a suit for specific performance if the alleged contract had been in writing."¹³¹

Even in the case of contracts relating to land it is not enough that services have been rendered in consideration of a verbal promise to grant lands, nor that the price has otherwise been paid in whole or in part; for the acts relied upon as part performance "must be unequivocally, and in their own nature, referable to some such agreement as that alleged."¹³² Where, however, the purchaser has taken possession¹³³ under a verbal contract for the sale of land, and paid

¹³¹ *McManus v. Cooke*, 35 C. D. 697, per Kay, J. See *Anson, Cont.* (8th Ed.) 70.

¹³² *Maddison v. Alderson*, 8 App. Cas. 479, 7 Q. B. Div. 174. In this case a promise of a gift of land had been made to a person in consideration of her remaining in the service of the promisor during his lifetime. It was held that the continuance of the service for the required period could not be regarded as exclusively referable to the promised gift. It might have rested on other considerations. And see *Rogers v. Wolfe*, 104 Mo. 1, 14 S. W. 805; *Shaban v. Swan*, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517; *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092. But see *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218.

That payment or part payment of the purchase money is not alone sufficient, see *Glass v. Hulbert*, 102 Mass., at page 28, 3 Am. Rep. 418; *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6; *Peckham v. Balch*, 49 Mich. 179, 13 N. W. 506; *Boulder Valley D., M. & M. Co. v. Farnham*, 12 Mont. 1, 29 Pac. 277; *Webster v. Gray*, 37 Mich. 37; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252; *Crabill v. Marsh*, 38 Ohio St. 331; *Townsend v. Vanderwerker*, 20 D. C. 197; *Washington Brewery Co. v. Carry* (Md.) 24 Atl. 151; *Horn v. Luddington*, 32 Wis. 73; *Forrester v. Flores*, 64 Cal. 24, 28 Pac. 107; *Gallagher v. Gallagher*, 31 W. Va. 9, 5 S. E. 297; *Maxfield v. West*, 6 Utah, 327, 379, 23 Pac. 754, and 24 Pac. 98; *Humbert v. Brisbane*, 25 S. C. 506; *Temple v. Johnson*, 71 Ill. 13; *Cronk v. Trumble*, 66 Ill. 428; *Goddard v. Donaha*, 42 Kan. 754, 22 Pac. 708. Contra, where the price consisted of the dismissal of actions and marriage with a certain woman. *Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. 146. And see *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227. But marriage alone between the vendor and vendee is not sufficient. *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244. It is otherwise where there has been fraud in procuring the marriage. *Id.* Promise to devise land to the promisee's daughter if he will allow the promisor to adopt her. *Pond v. Sheean*, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414. Relinquishing of position by son-in-law, and living on land under agreement by father-in-law to give it to him. *Welch v. Whelpley*, 62 Mich. 15, 28 N. W. 744, 4 Am. St. Rep. 810. Delivery of deed as part performance. *Luzader v. Richmond*, 128 Ind. 344, 27 N. E. 736; *Swain v. Burnette*, 89 Cal. 564, 26 Pac. 1093.

¹³³ As to what constitutes sufficient possession, see *Hunt v. Lipp*, 30 Neb. 469, 46 N. W. 632; *Emmel v. Hayes*, 102 Mo. 186, 14 S. W. 209, 11 L. R. A. 323, 22 Am. St. Rep. 769; *Neibert v. Baghurst* (N. J. Ch.) 25 Atl. 474; *Swales v. Jackson*, 126 Ind. 282, 26 N. E. 62; *Cochran v. Ward*, 5 Ind. App. 89, 31 N. E. 581, 51 Am. St. Rep. 229.

the purchase money or other consideration,¹³⁴ or made valuable improvements thereon,¹³⁵ equity will enforce performance on the part of the vendor. "The whole doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation, on the faith of the oral agreement, that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. * * * The change of situation necessary to create this equitable estoppel must, of course, have been made in reliance upon, and in pursuance of, the oral agreement, and so connected with the performance of the contract that, from the nature of the case, the defendant should understand it was done in reliance upon his agreement."¹³⁶ Possession, to constitute such part performance as to warrant the interference of a court of equity, must have been under the contract,¹³⁷ and it must be accompanied by payment of the purchase money, or by valuable and permanent improvements. Mere possession alone is not enough.¹³⁸ Nor are improvements without possession sufficient.¹³⁹

¹³⁴ *Bechtel v. Cone*, 52 Md. 698; *Jamison v. Dimock*, 95 Pa. 52; *Carney v. Carney*, 95 Mo. 353, 8 S. W. 729; *Watts v. Witt*, 39 S. C. 356, 17 S. E. 822; *Fitzsimmons v. Allen's Adm'r*, 39 Ill. 440; *Lipp v. Hunt*, 25 Neb. 91, 41 N. W. 143; *Gould v. Banking Co.*, 136 Ill. 60, 26 N. E. 497; *Denlar v. Hile*, 123 Ind. 68, 24 N. E. 170. Contra, *Bradley v. Owsley*, 74 Tex. 69, 11 S. W. 1052.

¹³⁵ *Potter v. Jacobs*, 111 Mass. 32; *Barrett v. Forney*, 82 Va. 269; *Cutsinger v. Ballard*, 115 Ind. 93, 17 N. E. 206; *Hunter v. Mills*, 29 S. C. 72, 6 S. E. 907; *Wallace v. Scoggin*, 17 Or. 476, 21 Pac. 558; *Holmden v. Janes*, 42 Kan. 758, 21 Pac. 591; *Moulton v. Harris*, 94 Cal. 420, 29 Pac. 706; *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 103; *Hunkins v. Hunkins*, 65 N. H. 95, 18 Atl. 655; *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 9 Sup. Ct. 286, 32 L. Ed. 673; *Brown v. Sutton*, 129 U. S. 238, 9 Sup. Ct. 273, 32 L. Ed. 664; *McWhinnie v. Martin*, 77 Wis. 182, 46 N. W. 118; *Morrison v. Herrick*, 27 Ill. App. 339, affirmed in 130 Ill. 631, 22 N. E. 537; *Townsend v. Vanderwerker*, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; *Anderson v. Brewing Co.*, 173 Ill. 213, 50 N. E. 655; *Low v. Low*, 173 Mass. 580, 54 N. E. 257.

¹³⁶ *Brown v. Hoag*, 35 Minn. 373, 29 N. W. 135, per Mitchell, J. See, also, *Caton v. Caton*, L. R. 1 Ch. App. 147; *Semmes v. Worthington*, 38 Md. 298; *Wheeler v. Reynolds*, 66 N. Y. 227; *Sullivan v. O'Neal*, 66 Tex. 433, 1 S. W. 185; *Purcell v. Miner*, 4 Wall. 513; *Clark v. Clark*, 122 Ill. 388, 13 N. E. 553.

¹³⁷ *Jacobs v. Railroad Co.*, 8 Cush. (Mass.) 224; *Purcell v. Miner*, 4 Wall. (U. S.) 513, 18 L. Ed. 435; *Ducie v. Ford*, 138 U. S. 587, 11 Sup. Ct. 417, 34 L. Ed. 1091; *Green v. Groves*, 109 Ind. 519, 10 N. E. 401; *Miller v. Ball*, 64 N. Y., at page 292; *Birkbeck v. Kelly* (Pa. Sup.) 9 Atl. 313; *Boozier v. Teague*, 27 S. C. 348, 3 S. E. 551; *Mahana v. Blunt*, 20 Iowa, 142; *Messmore v. Cunningham*, 78 Mich. 623, 44 N. W. 145; *Pawlak v. Granowski*, 54 Minn. 130, 55 N. W. 831; *Clark v. Clark*, 122 Ill. 388, 13 N. E. 553; *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. 828. See, also, cases cited *supra*, note 133.

¹³⁸ *Glass v. Hulbert*, 102 Mass., at page 32, 3 Am. Rep. 418; *Hibbert v. Aylott's Heirs*, 52 Tex. 530; *Miller v. Ball*, 64 N. Y., at page 292; *Dougan v.*

¹³⁹ *Wooldridge v. Hancock*, 70 Tex. 18, 6 S. W. 818.

A few of the courts have refused to recognize the doctrine that part performance takes a contract out of the statute,¹⁴⁰ but the doctrine is supported both in England and in this country by an overwhelming weight of authority.

Compelling Execution of Writing.

In some states, courts of equity, in the exercise of their jurisdiction to grant relief in case of fraud, have compelled the execution of a written contract where the party sought to be charged had agreed to execute it, but afterwards fraudulently refused to keep his promise.¹⁴¹ Other courts hold that refusal to execute a written contract as agreed is not such a fraud as will take the contract out of the statute.¹⁴²

Part Performance—Recovery quasi ex Contractu.

Where one of the parties to a verbal contract within the statute of frauds pays money or performs services thereunder, of which the other party has received the benefit, the law implies a promise, or rather imposes a duty upon him, to pay for the benefit conferred; and an action may be maintained against him, not upon the contract, but upon the appropriate common counts in assumpsit, the measure of recovery being, not the agreed price, but the value of the benefit conferred.¹⁴³

Blocher, 24 Pa. 28; Moore v. Small, 19 Pa. 461; Galbreath v. Galbreath, 5 Watts (Pa.) 146; Ann Berta Lodge v. Leverton, 42 Tex., at page 26. But see Andrew v. Babcock, 63 Conn. 109, 26 Atl. 715; Kennemore v. Kennemore, 26 S. C. 251, 1 S. E. 881.

¹⁴⁰ Dunn v. Moore, 38 N. C. 364; Ridley v. McNairy, 2 Humph. (Tenn.) 174; Beaman v. Buck, 9 Smedes & M. (Miss.) 207; Pass v. Brooks, 125 N. C. 129, 34 S. E. 228.

¹⁴¹ Equitable Gaslight Co. v. Manufacturing Co., 63 Md. 285; Graft v. Loucks, 138 Pa. 453, 21 Atl. 203; Baker v. Baker, 2 S. D. 261, 49 N. W. 1064, 39 Am. St. Rep. 776; McDonald v. Youngbluth (C. C.) 46 Fed. 836. In Iowa the court decreed specific performance of a parol agreement to assign a patent right, though Rev. St. U. S. § 4898 [U. S. Comp. St. 1901, p. 3387], requires assignments to be in writing. Searle v. Hill, 73 Iowa, 367, 35 N. W. 490, 5 Am. St. Rep. 688.

¹⁴² Caylor v. Roe, 99 Ind. 1; Jackson v. Myers, 120 Ind. 504, 22 N. E. 90, and 23 N. E. 86; Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162. And see Glass v. Hulbert, 102 Mass. 30, 3 Am. Rep. 418.

¹⁴³ Whipple v. Parker, 29 Mich. 369; Whitaker v. Burrows, 71 Hun, 478, 24 N. Y. Supp. 1011; Patten v. Hicks, 43 Cal. 509. And see cases cited in following note. As to recovery of money or other consideration paid, see Welch v. Darling, 59 Vt. 136, 7 Atl. 547; Herrick v. Newell, 49 Minn. 198, 51 N. W. 819; Schroeder v. Loeber, 75 Md. 195, 23 Atl. 579, and 24 Atl. 226; Worth v. Patton, 5 Ind. App. 272, 31 N. E. 1130; Nelson v. Improvement Co., 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116. Recovery for services rendered. Cadman v. Markle, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707; Sprague v. Haines, 68 Tex. 215, 4 S. W. 371; Stevens v. Lee, 70 Tex. 279, 8 S. W. 40; Hartwell v. Young, 67 Hun, 472, 22 N. Y. Supp. 486; Jeffery v. Walker, 72

The Contract as a Defense.

The provision that "no action shall be brought" on verbal contracts within the statute not only prevents suit on such a contract, but prevents such a contract from being set up as a defense; as for instance, in an action on the quantum meruit by a party who has partly performed under it.¹⁴⁴

Who may Plead the Statute.

The benefits of the statute of frauds are personal, and it can only be set up by the parties to the contract or their privies.¹⁴⁵

Waiver of Statute.

A contract not put in writing, as required by the statute of frauds, not being void, but simply unenforceable by suit, the failure of the contract to comply with the statute may be waived by the party to be charged.¹⁴⁶ It is generally held to have been waived if not pleaded as a defense, unless the complaint shows that the case is within the statute.¹⁴⁷

Hun, 628, 25 N. Y. Supp. 161; *Wonsettler v. Lee*, 40 Kan. 367, 19 Pac. 862; *Springer v. Bien* (Com. Pl. N. Y.) 10 N. Y. Supp. 530; *Schoonover v. Vachon*, 121 Ind. 3, 22 N. E. 777; *Miller v. Eldredge*, 126 Ind. 461, 27 N. E. 132; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 511; *Koch v. Williams*, 82 Wis. 186, 52 N. W. 257. In Minnesota, inconsistently, the agreement fixes the value of the services rendered under it. *Kruger v. Leppel*, 42 Minn. 6, 43 N. W. 484; *Spinney v. Hill*, 81 Minn. 316, 84 N. W. 116. Recovery of expenses incurred, or money paid for the use of the other party. *Sprague v. Haines*, 68 Tex. 215, 4 S. W. 371. Recovery for use and occupancy of land from one who has used it under a parol agreement which he refuses to carry out. *Walker v. Shackelford*, 49 Ark. 503, 5 S. W. 887, 4 Am. St. Rep. 61; post, p. 552.

¹⁴⁴ *KING v. WELCOME*, 5 Gray (Mass.) 41; *Baker v. Lauterbach*, 68 Md. 64, 11 Atl. 704; *McGinnis v. Fernandes*, 126 Ill. 228, 19 N. E. 44; *Leman v. Randall*, 124 Mich. 687, 83 N. W. 994.

¹⁴⁵ *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Mewburn's Heirs v. Bass*, 82 Ala. 622, 2 South. 520; *Briggs v. United States*, 143 U. S. 346, 12 Sup. Ct. 391, 36 L. Ed. 180; *Dailey v. Kinsler*, 35 Neb. 835, 53 N. W. 973; *Best v. Davis*, 44 Ill. App. 624; *Grundies v. Kelso*, 41 Ill. App. 200; *Houser v. Lamont*, 55 Pa. 311, 93 Am. Dec. 755; *Book v. Mining Co. (C. C.)* 58 Fed. 106; *Bullion & Exch. Bank v. Otto (C. C.)* 59 Fed. 256; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *King v. Bushnell*, 121 Ill. 656, 13 N. E. 245; *St. Louis, K. & N. W. R. Co. v. Clark*, 121 Mo. 169, 25 S. W. 192, 26 L. R. A. 751.

¹⁴⁶ *Montgomery v. Edwards*, 46 Vt. 151, 14 Am. Rep. 618; *Cosand v. Bunker*, 2 S. D. 294, 50 N. W. 84; *Westfall v. Parsons*, 16 Barb. (N. Y.) 645; *Nunez v. Morgan*, 77 Cal. 427, 19 Pac. 753; *Brakefield v. Anderson*, 87 Tenn. 206, 10 S. W. 360; *Sarwell v. Sowles*, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943.

¹⁴⁷ *Wells v. Moniban*, 129 N. Y. 161, 29 N. E. 232; *McClure v. Otrich*, 118 Ill. 320, 8 N. E. 784; *Cosand v. Bunker*, 2 S. D. 294, 50 N. W. 84; *Espalla v. Wilson*, 86 Ala. 487, 5 South. 867; *Cozart v. Land Co.*, 113 N. C. 294, 18 S. E. 337; *Hamill v. Hall*, 4 Colo. App. 290, 35 Pac. 927. The statute must be affirmatively pleaded. *Birchell v. Neaster*, 36 Ohio St. 331; *Crane v. Powell*,

Conflict of Laws.

By the rules of private international law the validity of a contract, so far as regards its formation, is determined by the *lex loci contractus*; but the procedure, including the proof, in an action on a contract is governed by the *lex fori*. In a leading English case, in which action was brought in England on a verbal contract made in France, and which was valid and enforceable by the French law, it was held that, as the statute of frauds did not go to the existence of the contract, but affected the procedure only, and prevented proof, the statute of frauds governed the case, and prevented a recovery.¹⁴⁸ This case has been followed by the courts of some of our states, and has been approved by the federal supreme court.¹⁴⁹ The courts of many other states, however, have held the contrary, and will enforce a contract so long as it is not within the statute of frauds of the state in which it was made, and, on the other hand, will refuse to enforce a contract which is not within their own statute, but is within the statute of the state in which it was made.¹⁵⁰

SAME—CONTRACTS WITHIN SECTION 17.

52. IN GENERAL. The seventeenth section of the English statute, which has been substantially followed in most of the states, enacts that "no contract for the sale of any goods, wares or merchandises, for the price of £10 sterling, or upwards, shall be allowed to be good, except

- (a) "The buyer shall accept part of the goods so sold, and actually receive the same,
- (b) "Or give something in earnest to bind the bargain, or in part payment,
- (c) "Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

139 N. Y. 379, 34 N. E. 911; *Citty v. Manufacturing Co.*, 93 Tenn. 276, 24 S. W. 121, 42 Am. St. Rep. 919. But some courts hold that it may be raised under a general denial. *Fontaine v. Bush*, 40 Minn. 141, 46 N. W. 465, 12 Am. St. Rep. 722; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220. If the answer admits the contract, the statute must be pleaded. *Iverson v. Cirkel*, 56 Minn. 299, 57 N. W. 800; *Barrett v. McAllister*, *supra*.

¹⁴⁸ *Leroux v. Brown*, 12 C. B. 801.

¹⁴⁹ *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29; *Hunt v. Jones*, 12 R. I. 265, 34 Am. Rep. 635; *Pritchard v. Norton*, 106 U. S. 134, 1 Sup. Ct. 102, 27 L. Ed. 104; *Heaton v. Eldridge*, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737; *Buhl v. Stephens* (C. C.) 84 Fed. 922.

¹⁵⁰ *Decosta v. Davis*, 24 N. J. Law. 319; *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795, 51 Am. St. Rep. 229; *Denny v. Williams*, 5 Allen (Mass.) 1; *Allshouse v. Ramsay*, 6 Whart. (Pa.) 331, 37 Am. Dec. 417; *Houghtaling v. Ball*, 20 Mo. 563; *Low v. Andrews*, 1 Story, 38, Fed. Cas. No. 8,559; *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111, 37 Am. St. Rep. 186.

53. EXECUTORY SALE. The section applies to executory as well as to executed contracts.

54. WORK AND LABOR. It does not apply to contracts for work, labor, and materials, but a contract is not deemed to be one for work, labor, and materials,

- (a) In England and some states, where it contemplates the ultimate transfer of the property in a chattel for a price, although the chattel is to be made.
- (b) In most jurisdictions, where the chattel, although to be made, is one which the seller ordinarily makes and sells in the course of his business. It is otherwise if it is one which must be specially manufactured.
- (c) In New York and some other states, where the chattel is in existence, although the seller is to adapt it to the use of the buyer.

SAME—WHAT ARE GOODS, WARES, AND MERCHANDISES.

55. "Goods, wares, and merchandises" comprehend:

- (a) All corporeal movable property.
- (b) In the United States, generally (but not in England), incorporeal property, such as shares, bonds, notes, etc.
- (c) *Fructus naturales* and *fructus industriales*, where the ownership is not to pass until after severance.
- (d) *Fructus industriales* (perhaps) also where the ownership is to pass before severance.

The treatment of this section belongs more properly to a work on the law of sales, and the rules governing its application will be very briefly indicated.¹⁵¹

Although there was doubt in England, to remove which a special statute was enacted, it has been held with us that the statute applies not only to executed contracts of sale, but also to executory contracts, as, for instance, where the goods are not specified, but are to be afterwards obtained by the seller, or selected and set apart to the purchaser.¹⁵²

It also applies to sales at public auction as well as private sales.¹⁵³

A contract for the sale of goods is not taken out of the operation of the statute by the fact that there are other stipulations to which the statute does not apply.¹⁵⁴ The contract must be for the sale of goods, and a promise, therefore, by the seller of bonds or other goods to take them back is not within the statute. It is a promise to rescind the

¹⁵¹ See Tiffany, Sales, 35-81.

¹⁵² Bennett v. Hull, 10 Johns. (N. Y.) 364; Lamb v. Crafts, 12 Metc. (Mass.) 353; Edwards v. Railroad Co., 48 Me. 379; Franklin v. Long, 7 Gill & J. (Md.) 407; Cason v. Cheely, 6 Ga. 554; Sawyer v. Ware, 36 Ala. 676.

¹⁵³ Singstack's Ex'rs v. Harding, 4 Har. & J. (Md.) 186, 7 Am. Dec. 669. See, also, ante, p. 90.

¹⁵⁴ Hanson v. Marsh, 40 Minn. 1, 40 N. W. 841.

sale, not a promise to sell.¹⁵⁵ So, also, a contract by which one of the parties is to purchase goods for the other at a certain price, the latter agreeing to receive and pay for them on delivery, is a contract of agency, and not of bargain and sale, and is, therefore, not within the statute.¹⁵⁶ Nor is an oral agreement for a trading venture, by which one party agrees to account to the other for half the profits in consideration that the other shall bear half the losses, within the statute.¹⁵⁷

Value.

In most states the statute fixes the value of the goods under this section at \$50; but in some the value is fixed at a greater or less amount, and in two, at least, all contracts of sale are within the statute.

Where several articles, all of which exceed, but no one of which alone reaches, the value specified in the statute, are purchased independently at different times, each purchase is a separate contract, and is not within the statute; but it is otherwise if they are all purchased at the same time, in one and the same transaction.¹⁵⁸

Contracts for Work, Labor, and Materials.

A difficult question has arisen where labor has to be expended on the thing sold before the contract is executed, and the property transferred, as to whether the contract is for the sale of goods within the seventeenth section, or for work and labor, and therefore enforceable if to be performed within a year, so as not to be within the fourth section. The decisions on this question are not in accord.

In England it is held that the contract is for a sale of goods if it contemplates the ultimate transfer of the property in a chattel. "If the contract be such that it will result in the sale of a chattel," it was said in the leading English case, "the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, then an action for work and labor would be the proper remedy."¹⁵⁹

The courts of this country generally repudiate this doctrine,¹⁶⁰ but they differ as to what they deem the correct rule.

¹⁵⁵ Johnston v. Trask, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. Rep. 394.

¹⁵⁶ Hatch v. McBrien, 83 Mich. 159, 47 N. W. 214.

¹⁵⁷ Coleman v. Eyre, 45 N. Y. 41; Green v. Brookins, 23 Mich. 48, 9 Am. Rep. 74.

¹⁵⁸ BALDEY v. PARKER, 2 Barn. & C. 37.

¹⁵⁹ LEE v. GRIFFIN, 1 Best & S. 272.

¹⁶⁰ But see Pratt v. Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656; Burrell v. Highleyman, 33 Mo. App. 183. In some states the statute expressly excepts goods to be manufactured. Flynn v. Dougherty, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230.

In some states it is held that a contract for the sale of something which the seller ordinarily makes and sells in the course of his business is a contract for the sale of goods, and not for work and labor, though he may not have the goods on hand, but may have to manufacture them; but, if the goods are not such as he ordinarily makes, and have to be specially manufactured for the buyer, the contract is for work and labor.¹⁶¹

In other states a distinction is made between goods in existence when the contract is made and goods that have to be manufactured, and it is held that when the chattel is in existence the contract should be deemed one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and nonexisting chattels.¹⁶²

In some states this question is regulated by special provisions of the statute.¹⁶³

Goods, Wares, and Merchandises.

In England the term "goods, wares, and merchandises" has been limited to corporeal movable property, and is held not to include shares of stock, choses in action, and other incorporeal rights and property,¹⁶⁴ and the courts of some of our states have taken the same view.¹⁶⁵ In other states it is held that shares of stock, promissory notes, bonds, and the like, are "goods, wares, and merchandise."¹⁶⁶ It has also been

¹⁶¹ GODDARD v. BINNEY, 115 Mass. 450, 15 Am. Rep. 112; Lamb v. Crafts, 12 Mete. (Mass.) 353; Mixer v. Howarth, 21 Pick. (Mass.) 205, 32 Am. Dec. 256; Atwater v. Hough, 29 Conn. 509, 79 Am. Dec. 229; Crockett v. Scribner, 64 Me. 447; Edwards v. Railroad Co., 48 Me. 379; Finney v. Appgar, 31 N. J. Law, 267; Central Lith. & E. Co. v. Moore, 75 Wis. 170, 43 N. W. 1124, 6 L. R. A. 788, 17 Am. St. Rep. 186; Brown & Haywood Co. v. Wunder, 64 Minn. 450, 67 N. W. 357, 32 L. R. A. 593. See, also, Mechanical Boiler Cleaner Co. v. Kellner, 62 N. J. Law, 544, 43 Atl. 599.

¹⁶² PARSON v. LOUCKS, 48 N. Y. 17, 8 Am. Rep. 517; Cooke v. Millard, 65 N. Y. 352, 22 Am. Rep. 619; Deal v. Maxwell, 51 N. Y. 652; Higgins v. Murray, 73 N. Y. 252; Alfred Shrimpton & Sons v. Dworsky, 2 Misc. Rep. 123, 21 N. Y. Supp. 461; Eichelberger v. McCauley, 5 Har. & J. (Md.) 213, 9 Am. Dec. 514; Kentch v. Long, 27 Md. 188. A contract to paint a portrait is not within the statute. Turner v. Mason, 65 Mich. 662, 32 N. W. 846.

¹⁶³ Mighell v. Dougherty (Iowa) 53 N. W. 402.

¹⁶⁴ Humble v. Mitchell, 11 Adol. & E. 205. And see Pickering v. Appleby, Comyn, 354.

¹⁶⁵ Whittemore v. Gibbs, 24 N. H. 484; Vawter v. Griffin, 40 Ind. 593; Webb v. Railroad Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396.

¹⁶⁶ Tisdale v. Harris, 20 Pick. (Mass.) 9; Boardman v. Cutter, 128 Mass. 388; Baldwin v. Williams, 3 Mete. (Mass.) 365; Gooch v. Holmes, 41 Me. 523; Hudson v. Weir, 29 Ala. 294; Pray v. Mitchell, 60 Me. 430; North v. Forest, 15 Conn. 400; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337; Bernhardt v. Walls, 29 Mo. App. 206; GREENWOOD v. LAW, 55 N. J. Law,

held that a sale of book accounts,¹⁶⁷ or of land scrip,¹⁶⁸ is within the statute, but not an agreement for sale of an interest in an invention before letters patent are obtained.¹⁶⁹ In some states the statute uses the words "personal property," and these would, of course, apply to choses in action.¹⁷⁰ In other states the statute expressly mentions choses in action.

As we have already seen, "fructus industriales" are not an interest in land, within the fourth section.¹⁷¹ They are chattels, but it is an open question whether they are "goods, wares, and merchandises," within the seventeenth section.¹⁷² So, also, a sale of "fructus naturales," or the natural growth of land, not being of an interest in land where title is not to pass until after severance, is regarded as within the seventeenth section. Some courts, indeed, hold this to be so, though title is to pass before severance.¹⁷³ The question, however, is intricate, and the authorities conflicting, and it cannot be properly treated at any length in an elementary work on contracts.

SAME—ACCEPTANCE AND RECEIPT.

56. To satisfy this exception there must be both

- (a) **Acceptance, which in this country means assent by the buyer that the goods are to be taken by him in performance of the contract, and**
- (b) **Receipt, or the taking of possession of the goods by the buyer with the seller's consent, either by actual delivery or by agreement.**

Acceptance and receipt are distinct, and to satisfy this exception both are essential.¹⁷⁴ Acceptance may precede receipt,¹⁷⁵ or vice versa,¹⁷⁶

168, 26 Atl. 134, 19 L. R. A. 688; *Meehan v. Sharp*, 151 Mass. 564, 24 N. E. 907.

¹⁶⁷ *Walker v. Supple*, 54 Ga. 178.

¹⁶⁸ *Smith v. Bouck*, 33 Wis. 19.

¹⁶⁹ *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Blakeney v. Goode*, 30 Ohio St. 350. But see *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279.

¹⁷⁰ *Southern Life Ins. & Trust Co. v. Cole*, 4 Fla. 359.

¹⁷¹ Ante, p. 75.

¹⁷² See *Tiffany, Sales*, 48, and cases cited.

¹⁷³ Ante, p. 76.

¹⁷⁴ *Smith v. Hudson*, 6 Best & S. 431; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Cooke v. Millard*, 65 N. Y. 352, 367, 22 Am. Rep. 619; *Maxwell v. Brown*, 39 Me. 98, 63 Am. Dec. 605.

¹⁷⁵ *CUSACK v. ROBINSON*, 1 Best & S. 299; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Knight v. Mann*, 118 Mass. 143, 145; *Simpson v. Krumdick*, 28 Minn. 352, 355, 10 N. W. 18.

¹⁷⁶ *Beaumont v. Brengeri*, 5 C. B. 301; *Garfield v. Paris*, 96 U. S. 557, 563, 24 L. Ed. 821; *Vincent v. Germond*, 11 Johns. (N. Y.) 283; *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279; *Townsend v. Hargraves*, 118 Mass. 325, 332.

and both may be subsequent to the contract of sale.¹⁷⁷ Their effect is to prove that there is a contract, the terms of which may then be proved by parol.¹⁷⁸ Acceptance and receipt of a part, however small, is sufficient.¹⁷⁹

Acceptance.

Acceptance, as the meaning imports, is an assent by the buyer, meant to be final, that the goods are to be taken by him under and in performance of the contract.¹⁸⁰ If the contract is for sale of specific goods, acceptance necessarily takes place when the contract is entered into.¹⁸¹ If the contract is for sale of goods which are not specific, there can be no acceptance until the seller has indicated what goods he intends to deliver, and thereafter an acceptance may be shown by the buyer's declarations,¹⁸² or by any dealing with them as owner.¹⁸³ In England a highly artificial construction has in the later cases been put upon "acceptance," and it is held that any dealing with the goods which recognizes a pre-existing contract of sale is an acceptance,¹⁸⁴ but this later construction has never been adopted in the United States.

Actual Receipt.

Where acceptance is shown, a very liberal construction is placed on actual receipt. Receipt implies delivery, and must be with the seller's consent, and with the intention of transferring possession to the buyer as owner. The test is whether the seller has parted with his lien.¹⁸⁵

¹⁷⁷ Gault v. Brown, 48 N. H. 183, 188, 2 Am. Rep. 210; McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370; Marsh v. Hyde, 3 Gray (Mass.) 331; Bush v. Holmes, 53 Me. 417; McCarthy v. Nash, 14 Minn. 127 (Gil. 95).

¹⁷⁸ Tomkinson v. Straight, 17 C. B. 697; Garfield v. Paris, 96 U. S. 557, 566, 24 L. Ed. 821.

¹⁷⁹ Garfield v. Paris, *supra*; Damon v. Osborn, 1 Pick. (Mass.) 476, 11 Am. Dec. 229.

¹⁸⁰ Caulkins v. Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Meehon v. Sharp, 151 Mass. 564, 24 N. E. 907; Smith v. Fisher, 59 Vt. 53, 7 Atl. 816; Garfield v. Paris, 96 U. S. 567, 24 L. Ed. 821.

¹⁸¹ Cases cited *supra*, note 175.

¹⁸² Caulkins v. Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Shepherd v. Pressey, 32 N. H. 49; Schmidt v. Thomas, 75 Wis. 529, 44 N. W. 771; Galvin v. MacKenzie, 21 Or. 184, 27 Pac. 1039. It is sometimes said that mere words are not enough, but the cases in which such statements occur generally involve simply the proposition that they are not enough to constitute acceptance and receipt. Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316. See Tiffany, Sales, 56.

¹⁸³ Chaplin v. Rogers, 1 East. 195; Phillips v. Ocmulgee Mills, 55 Ga. 633; Bacon v. Eccles, 43 Wis. 227, 238; SULLIVAN v. SULLIVAN, 70 Mich. 583, 38 N. W. 472.

¹⁸⁴ Page v. Morgan, 15 Q. B. Div. 228; Taylor v. Smith [1893] 2 Q. B. 65.

¹⁸⁵ Phillips v. Bristolli, 2 Barn. & C. 511; Safford v. McDonough, 120 Mass. 290; Marsh v. Rouse, 44 N. Y. 643; Hinchman v. Lincoln, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337.

When the goods are to be forwarded to the buyer, if they are carried by the seller's servant or agent, there is no transfer of possession while they remain in his hands;¹⁸⁶ but if they are forwarded by a carrier designated by the buyer, an actual receipt takes place when they are delivered to him for carriage;¹⁸⁷ and if they are forwarded by common carrier, he, in the absence of special agreement, is the agent of the buyer and the result is the same.¹⁸⁸ The receipt of the goods by the carrier in such cases, on the other hand, is not an acceptance, such an agent having authority only to receive, and not to accept.¹⁸⁹

The possession of the goods may be transferred, and an actual receipt take place by agreement, without physical delivery. An actual receipt takes place by agreement: (1) When the goods are in the actual possession of the seller, if he becomes bailee of the goods for the buyer;¹⁹⁰ (2) when the goods are in the custody of the buyer, as bailee of the seller, if with the consent of the seller he ceases to hold as bailee, and holds them as owner;¹⁹¹ (3) when the goods are in the custody of a third person as bailee of the seller, if such third person, with the consent of the seller and the buyer, becomes bailee of the buyer;¹⁹² and (4) when the goods are not in the custody of any person, as timber at a public wharf, or logs floating in a river, and the buyer and the seller agree that the possession is transferred.¹⁹³

¹⁸⁶ *Agnew v. Dumas*, 64 Vt. 147, 23 Atl. 634; *Gray v. Cary*, 9 Daly, 363.

¹⁸⁷ *Bullock v. Tschergi*, 4 McCrary, 184, 13 Fed. 345; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721. See cases *infra*, note 193.

¹⁸⁸ *Wait v. Baker*, 2 Ex. 1; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Sarbecker v. State*, 65 Wis. 171, 26 N. W. 541, 56 Am. Rep. 624.

¹⁸⁹ *Hanson v. Armitage*, 5 Barn. & Ald. 557; *Hunt v. Hecht*, 8 Ex. 814; *Allard v. Greasert*, 61 N. Y. 1, 5; *Fontaine v. Bush*, 40 Minn. 141, 41 N. W. 465, 12 Am. St. Rep. 722.

¹⁹⁰ *Elmore v. Stone*, 1 Taunt. 458; *Beaumont v. Brengeri*, 5 C. B. 301; *Green v. Merriam*, 28 Vt. 801; *Rodgers v. Jones*, 129 Mass. 420; *Webster v. Anderson*, 42 Mich. 554, 4 N. W. 288, 36 Am. Rep. 452.

¹⁹¹ *Edan v. Dudfield*, 1 Q. B. 306; *Lillywhite v. Devreux*, 15 Mees. & W. 285; *Snider v. Thrall*, 56 Wis. 674, 14 N. W. 814.

¹⁹² *Bentall v. Burn, B. & C.* 423; *Farina v. Home*, 16 Mees. & W. 119; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Bassett v. Camp*, 54 Vt. 232.

¹⁹³ *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 H. & C. 722; *Leonard v. Davis*, 1 Black, 476, 17 L. Ed. 222; *Boynton v. Veazie*, 24 Me. 286; *Kingsley v. White*, 57 Vt. 565; *Brewster v. Leith*, 1 Minn. 56 (Gil. 40).

SAME—EARNEST AND PART PAYMENT.

57. EARNEST. Earnest is something of value, not forming part of the price, given and received to mark the final assent of the parties to the bargain.

58. PART PAYMENT. Part payment may be made at or (unless the statute otherwise requires) subsequently to the time of the contract, either in money or anything of value.

Earnest and part payment are distinct.¹⁹⁴ Earnest may be money or some gift or token given to mark the assent to the bargain.¹⁹⁵ The custom of giving earnest was formerly prevalent in England, but has fallen into disuse, and the provision in regard to it is of little practical importance.

Part payment may be subsequent to the contract,¹⁹⁶ unless, as in some states, the statute provides that it must be given at the time of the contract.¹⁹⁷ It must be accepted.¹⁹⁸ It need not be money, but may be anything of value, which by mutual agreement is given and accepted on account or in part satisfaction of the price.¹⁹⁹

SAME—FORM REQUIRED.

59. The rules as to the form required by section 17 are the same as in case of section 4, except that the consideration of the promise of the party to be charged need not appear.

The note or memorandum is sufficient if it comply with the rules already stated with reference to the form required by section 4. It is not necessary, however, that the consideration of the promise of the party to be charged be stated; in other words, if the memorandum contains his promise, it need make no reference to the promise of the

¹⁹⁴ *Benj. Sales* (6th Am. Ed.) § 189; *Howe v. Smith*, 27 Ch. D. 89, 101. But see *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306, where it is said that earnest is regarded as part payment.

¹⁹⁵ *Brac.* 1, 2, c. 27.

¹⁹⁶ *WALKER v. NUSSEY*, 16 Mees. & W. 302; *Thompson v. Alger*, 12 Metc. (Mass.) 428, 435; *Marsh v. Hyde*, 3 Gray (Mass.) 331.

¹⁹⁷ *Hunter v. Wetsell*, 57 N. Y. 375, 15 Am. Rep. 508; *Id.*, 84 N. Y. 549, 38 Am. Rep. 544; *Jackson v. Tupper*, 101 N. Y. 515, 5 N. E. 65; *Kerkhof v. Paper Co.*, 68 Wis. 674, 32 N. W. 766.

¹⁹⁸ *Edgerton v. Hodge*, 41 Vt. 676.

¹⁹⁹ *White v. Drew*, 56 How. Prac. (N. Y.) 53; *Weir v. Hudnut*, 115 Ind. 525, 18 N. E. 24. Surrender of seller's note, *Sharp v. Carroll*, 66 Wis. 62, 27 N. W. 832; transfer of bill or note, *Griffiths v. Owen*, 13 Mees. & W. 58; under statute requiring payment at time, delivery of check, *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544.

other party.²⁰⁰ Thus a memorandum in the form of a mere offer, though the acceptance be oral, is good.²⁰¹ But the price is a material part of the bargain, and must be stated,²⁰² though if it be not agreed upon, but is implied, a memorandum which states no price is sufficient.²⁰³

SAME—EFFECT OF NONCOMPLIANCE.

60. As in case of section 4, it is generally held that failure to comply with the provisions of section 17 does not render the contract void, but merely prevents its enforcement.

This section declares that, if there be no acceptance and receipt, no earnest or part payment, and no note or memorandum, the contract shall not "be allowed to be good," thus differing from section 4, which merely declares that no action shall be brought. In England it seems not to have been directly decided whether these words mean that the contract shall be utterly void, or merely incapable of being sued upon, as in case of contracts under section 4; and the dicta of the judges are conflicting. The latter position is sustained by the weight of opinion.²⁰⁴ In Massachusetts, where the statute provided that no such contract should be "good or valid," it has been held that the difference in the wording of the two sections was immaterial, and that failure of a contract to comply with the requirements of section 17 does not go to its existence, but merely renders it unenforceable by suit, as under the fourth section.²⁰⁵ In Missouri, however, it has been held that section 17 goes to the very existence of the contract.²⁰⁶ In some states the statute declares that the contract shall be "void."

²⁰⁰ *Edgerton v. Mathews*, 6 East. 307; *Sarl v. Bourdillon*, 1 C. B. N. S. 188; *Smith v. Ide*, 3 Vt. 290; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352.

²⁰¹ *Reuss v. Picksley*, L. R. 1 Ex. 342; *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Justice v. Lang*, 42 N. Y. 493, 1 Am. Rep. 576; *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118; *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794.

²⁰² *Elmore v. Kingscote*, 5 B. & C. 583; *Ashcroft v. Butterworth*, 136 Mass. 511; *Stone v. Browning*, 68 N. Y. 598; *Hanson v. Marsh*, 40 Minn. 1, 40 N. W. 841.

²⁰³ *Hoadley v. McLaine*, 10 Bing. 482; *Ashcroft v. Morrison*, 4 M. & G. 450.

²⁰⁴ *Anson*, Cont. (4th Ed.) 67; *Pol. Cont.* 605.

²⁰⁵ *Townsend v. Hargraves*, 118 Mass. 325; *Wainer v. Insurance Co.*, 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598. See, also, *BIRD v. MUNROE*, 66 Me. 337, 22 Am. Rep. 571. Ante, p. 91.

²⁰⁶ *Houghtaling v. Ball*, 20 Mo. 563. See, also, *Green v. Lewis*, 26 U. C. Q. B. 618.

CHAPTER V.

CONSIDERATION.

- 61, 62. Consideration Defined.
- 63, 64. Necessity for Consideration, and Presumption.
- 65, 66. Adequacy of Consideration.
- 67. Sufficiency or Reality of Consideration.
- 68-70. Mutual Promises—Mutuality.
- 71-73. Forbearance to Exercise a Right.
- 74-76. Doing What One is Bound to Do.
- 77, 78. Impossible and Vague Promises.
- 79. Legality of Consideration.
- 80. Consideration in Respect of Time—Past Consideration.

CONSIDERATION DEFINED.

- 61. Consideration is that which moves from the promisee to the promisor, at the express or implied request of the latter, in return for his promise.**
- 62. As the term is used in the law of contract, it means a "valuable" consideration; that is, something having value in the eye of the law. It may consist either in "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."**

The law requires every simple contract to be based on what it deems a valuable consideration. We shall take up in turn the different forms which consideration may assume, and explain at length what is deemed a consideration.¹ At the outset, however, it will be well to explain in a general way what we mean when we speak of the consideration for a promise. Consideration means that which moves from the promisee to the promisor, at the latter's request, in return for his promise. Consideration "is something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in respect of the promise."² If, for instance, one man, by paying another a sum of money, procures a promise from the latter in return to do something for his benefit, the money paid is the consideration for the promise. Consideration, however, need not be the payment of money. It may consist "in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered,

¹ For the history of consideration, the student should read Anson, *Cont.* (8th Ed.) 43; Poll. *Cont.* 179; Holmes, *Com. Law*, 253-271, 284-287.

² Anson, *Cont.* (8th Ed.) 74.

or undertaken by the other;"³ provided, however, the benefit conferred or detriment suffered is deemed of value in the eye of the law.⁴ If a person does work for another on the latter's express or implied promise to pay for it, or gives another permission to use his property in return for a promise, or gives up his right to sue another, on the latter's promise to pay money or do some other act, there is in each case either a benefit accruing to the promisor, or a detriment suffered by the promisee, or both; and this is the consideration for the promise. So, also, if a person promises another to do something on the latter's promising him to do something, as where one man promises another to sell him goods, and the promisee promises to buy them, and pay for them, a right is conferred by each to the benefit of the other's promise, and a responsibility is undertaken by each. The promise of each is the consideration for the promise of the other.⁵

The fact that the benefit conferred or detriment suffered is slight does not render it any the less a valuable consideration.⁶ The naming of a child after a person will support his promise to pay a large sum of money.⁷

Consideration Distinguished from Motive.

"Motive is not the same thing ~~with~~ consideration. Consideration means something which is of value in the eye of the law, moving from" the promisee.⁸ Confusion between motive and consideration has, however, sometimes arisen, and has taken two forms: (1) The distinction which once existed between "good" and "valuable" consideration; and (2) the view which once maintained that a moral obligation was sufficient to support a promise.

³ Currie v. Misa, L. R. 10 Exch. 162. See, also, BAINBRIDGE v. FIRMSTONE, 8 Adol. & E. 743; Handraban v. O'Regan, 45 Iowa, 298; DEVECMON v. SHAW, 69 Md. 199, 14 Atl. 474, 9 Am. St. Rep. 422; HAMER v. SIDWAY, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693; Byrne v. Cummings, 41 Miss. 192; Day v. Gardner, 42 N. J. Eq. 199, 7 Atl. 365; Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Sanders v. Carter, 91 Ga. 450, 17 S. E. 345; Dorwin v. Smith, 35 Vt. 69; Train v. Gold, 5 Pick. (Mass.) 380; Emerson v. Slater, 22 How. 43, 16 L. Ed. 360; Taylor v. Williams, 120 Ind. 414, 22 N. E. 118; Marshalltown Stone Co. v. Manufacturing Co., 114 Iowa, 574, 87 N. W. 496; Gunther v. Gunther, 181 Mass. 217, 63 N. E. 402. And see the old cases of TRAVER v. — (1667) 1 Sid. 57; PAYNTER v. CHAMBERLYN (1639) 1 Rolle, Abr. 22; HAWES v. SMITH (1675) 2 Lev. 122.

⁴ Post, p. 116.

⁵ Funk v. Hough, 29 Ill. 145; Earle v. Angell, 157 Mass. 294, 32 N. E. 164. And see post, p. 116.

⁶ State v. Baker, 8 Md. 44.

⁷ Wolford v. Powers, 85 Ind. 294; Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87; Daily v. Minniece, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840.

⁸ THOMAS v. THOMAS, 2 Q. B. 851. See, also, PHILPOT v. GRUNINGER, 14 Wall. 570, 20 L. Ed. 743.

Same—Good Consideration.

Natural affection for a near relative, or, as it is generally said, the consideration of blood, or natural love and affection, is said to be a "good," but not a "valuable," consideration.⁹ In the law of contract the consideration must be "valuable." In some early English cases it was attempted to ingraft the doctrine of good consideration, which had been applied in case of covenants to stand seised, upon the law of contract, but it was not allowed. The mere existence of natural affection as a motive for a promise has probably never been held to amount to a valuable consideration, so as to support an executory contract.¹⁰

It was formerly held that if a person for whose benefit a binding promise was made was nearly related to the promisee, the relationship and the fact that the contract was prompted by natural affection would give a right of action to the beneficiary. This exception to the rule that a contract cannot confer rights upon a person who is not a party to it is no longer generally recognized.¹¹ The question of the right of a third person who did not furnish the consideration to sue upon a promise made for his benefit will be considered in discussing the operation of contract.¹²

Same—Moral Obligation.

There are some cases to the effect that a mere moral obligation is sufficient consideration to support a promise,¹³ but it is now well settled

⁹ Chit. Cont. 27. "A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty. A valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant, and is therefore founded in motives of justice. Deeds made upon good consideration only are considered as merely voluntary, and are frequently set aside in favor of creditors and bona fide purchasers." 2 Bl. Comm. 297.

¹⁰ BRET v. J. S. AND WIFE, Cro. Eliz. 755; FINK v. COX, 18 Johns. (N. Y.) 145, 9 Am. Dec. 191; Priester v. Priester, Rich. Eq. Cas. 26, 18 Am. Dec. 191; Kirkpatrick v. Taylor, 43 Ill. 207; Smith v. Kittridge, 21 Vt. 238; Phillips v. Frye, 14 Allen (Mass.) 36; Pennington v. Gittings, 2 Gill & J. (Md.) 208; Dugan v. Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306; Whitaker v. Whitaker, 52 N. Y. 368, 11 Am. Rep. 711; Cotton v. Graham, 84 Ky. 672, 2 S. W. 647; Hadley v. Reed, 58 Hun, 608, 12 N. Y. Supp. 163; Williams v. Forbes, 114 Ill. 167, 28 N. E. 463; Wilbur v. Warren, 104 N. Y. 196, 10 N. E. 263.

¹¹ Post, p. 352.

¹² Post, p. 351.

¹³ HAWKES v. SAUNDERS, Cowp. 289; LEE v. MUGGERIDGE, 5 Taunt. 36; Clark v. Herring, 5 Binn. (Pa.) 35; Glass v. Beach, 5 Vt. 173; State v. Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628; Drury v. Briscoe, 42 Md. 162; Musser v. Ferguson Tp., 55 Pa. 475; In re Sutch's Estate, 201 Pa. 305, 50 Atl. 943. And see Brown v. Latham, 92 Ga. 280, 18 S. E. 421; Lawrence v. Oglesby, 178 Ill. 122, 52 N. E. 945. See post, p. 142.

to the contrary.¹⁴ A man may believe himself to be under a moral obligation, either because he has received actual benefits in the past, or from motives of piety, delicacy, or friendship. Now, a past consideration, as will be seen,¹⁵ is in truth no consideration at all, for the promisor does not receive a benefit, nor the promisee suffer a detriment, in return for the promise. There are certain exceptions to this statement, which will be noticed in treating of past consideration, but it will be seen that the validity of the promise in those cases does not properly rest on the basis of moral obligation, though some courts put it upon that ground. The insufficiency of past benefits to support a promise on the ground of moral obligation was settled in England in a case in which it was said: "The doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."¹⁶

If the actual receipt of a benefit in the past does not constitute consideration for a subsequent promise, still less will such duties of honor, conscience, or friendship as a man may conceive to be incumbent on him. A man may be bound in honor to pay money lost in a wager, but, inasmuch as the law has declared wagers to be void, a promise to pay such a debt would be unenforceable for want of a consideration.¹⁷ In like manner, a pious wish on the part of executors to carry out the intentions of the testator is no consideration for promises made by them.¹⁸

¹⁴ *EASTWOOD v. KENYON*, 11 Adol. & E. 438; *MILLS v. WYMAN*, 3 Pick. (Mass.) 207; *BEAUMONT v. REEVE*, 8 Q. B. 483; *Ehle v. Judson*, 24 Wend. (N. Y.) 97; *COOK v. BRADLEY*, 7 Conn. 57, 18 Am. Dec. 79; *VALENTINE v. FOSTER*, 1 Metc. (Mass.) 520, 35 Am. Dec. 377; *Updyke v. Titus*, 13 N. J. Eq. 151; *Farnham v. O'Brien*, 22 Me. 475; *SHEPARD v. RHODES*, 7 R. I. 470, 84 Am. Dec. 573; *Gay v. Botts*, 13 Bush (Ky.) 299; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Osier v. Hobbs*, 33 Ark. 215; *McElven v. Sloan*, 56 Ga. 208. A promise by a husband to his wife on her deathbed that their son should have certain property is not a valuable consideration for a conveyance from the father to the son. *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244. See post, p. 141, note 166.

¹⁵ Post, p. 136.

¹⁶ *EASTWOOD v. KENYON*, 11 Adol. & E. 438.

¹⁷ *Morris v. Norton*, 75 Fed. 912, 21 C. C. A. 553.

¹⁸ *Anson*, Cont. (4th Ed.) 79; *THOMAS v. THOMAS*, 2 Q. B. 851.

NECESSITY FOR CONSIDERATION, AND PRESUMPTION.

63. NECESSITY—A valuable consideration is essential to the validity of every simple contract.

EXCEPTION—Want of consideration does not avoid a negotiable instrument in the hands of a bona fide purchaser for value.

64. PRESUMPTION—Negotiable instruments are by the law merchant deemed *prima facie* to have been issued for a valuable consideration; and by statute in some jurisdictions the same is true of all other simple contracts in writing, and of contracts under seal in those jurisdictions where the common-law effect of a seal has been abolished.

Consideration is the universal requisite of all contracts not under seal, except the so-called "contracts of record," which, like contracts under seal, derive their validity from their form alone.¹⁹ The rule applies to all simple contracts,²⁰ including those contracts which are required to be in writing, either by the statute of frauds, or by other statutes, or by the common law. It was at one time doubted whether a promise not under seal needed a consideration if it was put in writing,²¹ but the necessity for a consideration was affirmed and settled in England in 1778 in a suit against an administratrix who, without consideration, had promised in writing to answer damages out of her own estate. It was contended that the writing required by the statute of frauds rendered consideration unnecessary, but the contrary was held. "It is undoubtedly true," it was said, "that every man is by the law of nature bound to fulfill his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such agreement is '*nudum pactum ex quo non oritur actio*;' and, whatever may be the sense of this maxim in the civil law, it is in the last sense only that it is to be understood in our law.

¹⁹ RANN v. HUGHES, 7 Term R. 346; COOKE v. OXLEY, 3 Term R. 653; Burnet v. Bisco, 4 Johns. (N. Y.) 235; Doebler v. Waters, 30 Ga. 344; Lowe v. Bryant, 32 Ga. 235; Oullahan v. Baldwin, 100 Cal. 648, 35 Pac. 310; Branson v. Kitchenman, 148 Pa. 541, 24 Atl. 61; McLean v. McBean, 74 Ill. 134; Baer v. Christian, 83 Ga. 322, 9 S. E. 790; Bailey v. Walker, 29 Mo. 407; Hendy v. Kier, 59 Cal. 138; Culver v. Banning, 19 Minn. 303 (Gil. 260); IN RE JAMES, 78 Hun, 121, 28 N. Y. Supp. 992.

²⁰ The guaranty of another's debt must be supported by a consideration. In these contracts there are two considerations—a consideration for the original contract, and a consideration for the guaranty. See Briggs v. Latham, 36 Kan. 205, 13 Pac. 129. If, however, as we have seen, a note, for instance, is guarantied by a third person before its delivery to the payee, the consideration from the payee to the maker is sufficient to support the guaranty as well as the note. Winans v. Manufacturing Co., 48 Kan. 777, 30 Pac. 163; Heyman v. Dooley, 77 Md. 162, 26 Atl. 117, 20 L. R. A. 257.

²¹ PILLANS v. VAN MIEROP (A. D. 1765) 3 Burrows, 1663.

* * * All contracts are, by the law of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written, and not specialties, they are parol, and a consideration must be proved."²²

Negotiable Instruments.

Bills of exchange, promissory notes, and other negotiable instruments are to some extent an exception to this rule.

As between the immediate parties to the instrument consideration is necessary. Consideration, however, is said to be presumed—that is, the instrument itself is *prima facie* evidence of consideration; but the defendant may introduce evidence in rebuttal of the presumption, and if he can show that no consideration was given for his making or indorsement of the instrument his promise fails.²³ The rule is the same when the party suing is a subsequent holder, unless he is a purchaser for value before maturity without notice, in which case want of consideration is not a defense.²⁴

Gratuitous Employment.

"The promise of a gratuitous service, although not enforceable as a promise, involves a liability to use ordinary care and skill in performance";²⁵ or, as it is usually put, the promisee is not liable for nonfeasance, but is liable for misfeasance, and this is sometimes said to be another exception to the rule that consideration is necessary to the validity of every simple contract. The ground of this liability is somewhat obscure. Where a person delivers over property to a bailee or agent, it is perhaps possible to find a consideration in the detriment which the bailor or principal suffers in parting with control.²⁶ But in the mere case of gratuitous service or agency, this element of consideration, if such it be, does not exist. It is sometimes said that the trust and confidence reposed is a sufficient consideration,²⁷ but if this were so it would be a sufficient consideration for the promise

²² RANN v. HUGHES, 7 Term R. 350. See, also, COOK v. BRADLEY, 7 Conn. 57; In re Hess' Estate, 150 Pa. 346, 24 Atl. 676; Brown v. Adams, 1 Stew. (Ala.) 51, 18 Am. Dec. 48; Burnet v. Bisco, 4 Johns. (N. Y.) 235; Perrine v. Cheeseman, 11 N. J. Law, 174, 19 Am. Dec. 388; Train v. Gold, 5 Pick. (Mass.) 380; Eddy v. Roberts, 17 Ill. 505.

²³ Norton, Bills & N. (3d Ed.) 270.

²⁴ Id. 276.

²⁵ Anson, Contr. (8th Ed.) 76, 83. See, also, Wilkinson v. Coverdale, 1 Esp. 75; THORNE v. DEAS, 4 Johns. (N. Y.) 84; Walker v. Smith, 1 Wash. C. C. 152, Fed. Cas. No. 17,086; Williams v. Higgins, 30 Md. 404; Passano v. Acosta, 4 La. 26, 23 Am. Dec. 470; Spencer v. Towles, 18 Mich. 9; Isham v. Post, 141 N. Y. 100, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 766.

²⁶ Coggs v. Bernard, 2 Ld. R. 909; Whitehead v. Greetham, 2 Bing. 464.

²⁷ Hammond v. Hussey, 51 N. H. 40, 12 Am. Rep. 41.

to perform, and render the promisee liable for nonfeasance. It must be admitted that the liability in these cases arises independently of any consideration to support the undertaking. Whether this liability is to be regarded as an anomaly in the law of contract²⁸ or as arising independently of contract²⁹ need not be considered.

Statutory Presumption of Consideration.

In some states, statutes have been enacted declaring that all written instruments shall be presumptive evidence of a consideration, rebuttable, however, by showing that there was in fact no consideration, thereby putting all simple contracts in writing, to this extent, on a level with negotiable instruments.³⁰ The statutory changes in the law in respect to instruments under seal have already been referred to.³¹

ADEQUACY OF CONSIDERATION.

65. The validity of the contract is not dependent upon the adequacy of the consideration, provided it is something of value in the eye of the law.³²

66. In equity, inadequacy of consideration, if such as to be evidence of fraud, is ground for refusing specific performance; and inadequacy of consideration is regarded as corroborative evidence in suits for relief from contracts on the ground of fraud and undue influence.

In General.

At law the benefit conferred or detriment suffered by the promisee in exchange for the promise need not be equal to the responsibility assumed by the promisor; or, in other words, the consideration need not be adequate. Any real consideration, however small, will support a promise. So long as a man gets what he has bargained for, and it is of some value in the eye of the law, the courts will not ask what its value may be to him, or whether its value is in any way proportionate to his act or promise given in return, for this would be "the law making the bargain instead of leaving the parties to make it."³³ In

²⁸ Anson, *Contr.* (8th Ed.) 85.

²⁹ "Gratuitous Undertakings," by Joseph H. Beale, Jr., 5 *Harv. L. R.* 222.

³⁰ There are such statutes in California, Indiana, Iowa, Kansas, Kentucky, Missouri, and possibly in other states.

³¹ Ante, p. 60.

³² Anson, *Cont.* (8th Ed.) 76.

³³ *Pilkington v. Scott*, 15 Mees. & W. 660; *Worth v. Case*, 42 N. Y. 362; *Hubbard v. Coolidge*, 1 Mete. (Mass.) 84; *BROOKS v. BALL*, 18 Johns. (N. Y.) 337; *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435; *Earl v. Peck*, 64 N. Y. 596; *Dorwin v. Smith*, 35 Vt. 69; *Boggs v. Wann* (C. C.) 58 Fed. 681; *Eyre v. Potter*, 15 How. 42, 14 L. Ed. 592; *Grandin v. Grandin*, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956; *Minneapolis Land Co. v. McMillan*, 79 Minn. 287, 82 N. W. 591; *Bigelow v. Bigelow*, 95 Me. 17, 49 Atl. 49; *Casserleigh v. Wood*, 119 Fed. 308, 56 C. C. A. 212.

a case in the supreme court of the United States, Mr. Justice Story said, in speaking of a guaranty of another's debt, made in consideration of one dollar: "A valuable consideration, however small or nominal, if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any parol contract. * * * A stipulation in consideration of one dollar is just as effectual and valuable a consideration as a larger sum stipulated for or paid."⁸⁴

Forbearance by a creditor, for instance, to levy an execution on the debtor's property, will support a promise by the debtor or by a third person to pay a larger sum than could have been recovered under the execution. "If," said Lord Tenterden in such a case, "the inconvenience of an execution against these goods at the time in question was so great that the defendant thought proper to buy it off at such an expense, I do not see that the consideration is insufficient for the promise."⁸⁵

There may even be a consideration without the accrual of any benefit at all to the promisor. If the promisee has suffered any detriment, however slight, or, though he has suffered no real detriment, if he has done what he was not otherwise bound to do, in return for the promise, he has given a consideration; and the court will not ask whether the promisor was benefited.⁸⁶ Where, for instance, the owner of boilers gave another permission to weigh them on the latter's promise to return them in good condition, the permission and advantage taken of it was held a sufficient consideration for the promise. "The defendant," said the court, "had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave."⁸⁷

So where the defendant had made the promise sued upon in consideration of the plaintiffs' surrender of a guaranty which had been given by the defendant, but which turned out to have been unenforceable because it was within the statute of frauds, the surrender was held a sufficient consideration for the promise. "Whether or no the guaranty could have been available," said the court, "the plaintiffs were induced by the defendant's promise to part with something which

⁸⁴ *Lawrence v. McCalmont*, 2 How. 426, 11 L. Ed. 326. And see *Appeal of Ferguson*, 117 Pa. 426, 11 Atl. 885.

⁸⁵ *SMITH v. ALGAR*, 1 Barn. & Adol. 603.

⁸⁶ *TRAVER v. —*, 1 Sid. 57; *Chick v. Trevett*, 20 Me. 462, 37 Am. Dec. 68; *Fisher v. Bartlett*, 8 Greenl. (Me.) 122, 22 Am. Dec. 225; *Hind v. Holdship*, 2 Watts (Pa.) 104, 26 Am. Dec. 107; *Glasgow v. Hobbs*, 32 Ind. 440; *Cates v. Bales*, 78 Ind. 285; *DOYLE v. DIXON*, 97 Mass. 208, 93 Am. Dec. 80; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Hall Mfg. Co. v. Supply Co.*, 48 Mich. 331, 12 N. W. 205.

⁸⁷ *BAINBRIDGE v. FIRMSTONE*, 8 Adol. & El. 743.

they might have kept, and the defendant obtained what he desired by means of that promise."³⁸

On this principle, the refraining by a person from the use of liquor and tobacco for a certain time at the request of another has been held a sufficient consideration for a promise by the latter to pay him a sum of money.³⁹ So, also, where a person traveled for his own pleasure and benefit at the request of another, this was held sufficient to support a promise by the latter to reimburse him for his expenses;⁴⁰ and, where an executor forbore to act as such on his coexecutor's promise to divide commissions with him, the forbearance was held a consideration for the promise.⁴¹ It has even been held that the liability incurred in purchasing property upon the faith of a promise made by another to contribute a certain sum in part payment of the price is a sufficient consideration to make the promise binding;⁴² and where a person agreed to contribute a sum of money for the purpose of discharging a mortgage on church property, on condition that the church would raise the balance by voluntary subscription, and the church performed the condition, it was held that the promise became binding.⁴³

Marriage is a valuable consideration for a promise,⁴⁴ and mutual promises to marry are a consideration each for the other.⁴⁵

We have seen, in discussing contracts under seal, that want of consideration may be shown notwithstanding the seal, where the contract is in partial restraint of trade. The fact, however, that a contract is

³⁸ *HAIGH v. BROOKS*, 10 Adol. & El. 309. And see *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181; *Churchill v. Bradley*, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563; *Sykes v. Chadwick*, 18 Wall. 141, 21 L. Ed. 824; *Merchant v. O'Rourke*, 111 Iowa, 351, 82 N. W. 759. Contra: *McCullum v. Edmonds*, 109 Ala. 322, 19 South. 501.

³⁹ *HAMER v. SIDWAY*, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693; *TALBOTT v. STEMMONS' EX'R*, 89 Ky. 222, 12 S. W. 297, 5 L. R. A. 856, 25 Am. St. Rep. 531; *Lindell v. Rokes*, 60 Mo. 249, 21 Am. Rep. 395.

⁴⁰ *DEVECMON v. SHAW*, 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422. See, also, *Hoshor v. Kautz*, 19 Wash. 258, 53 Pac. 51.

⁴¹ *Ohlendorff v. Kanne*, 66 Md. 495, 8 Atl. 351. See, also, *John v. John*, 122 Pa. 107, 15 Atl. 675.

⁴² *Steele v. Steele*, 75 Md. 477, 23 Atl. 959; *Skidmore v. Bradford*, L. R. 8 Eq. 134.

⁴³ *Roberts v. Cobb*, 103 N. Y. 600, 9 N. E. 500.

⁴⁴ *Shadwell v. Shadwell*, 9 C. B. (N. S.) 159; *Wright v. Wright*, 54 N. Y. 437; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. 41; *Dugan v. Gittings*, 3 Gill (Md.) 138, 43 Am. Dec. 306; *Rockafellow v. Newcomb*, 57 Ill. 191; *Frank's Appeal*, 59 Pa. 194; *Nowack v. Berger*, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Wright v. Wright*, 114 Iowa, 748, 87 N. W. 709, 55 L. R. A. 261. Release from promise to marry is sufficient. *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14.

⁴⁵ *Post*, p. 117.

in partial restraint of trade forms no exception to the doctrine that adequacy of consideration cannot be inquired into.⁴⁶

Exception in Exchange of Fixed Values.

The doctrine that courts of law will not inquire into the adequacy of consideration is based on their inability to determine what value the parties may have attached to a thing given or promised, and it does not apply to an exchange of things the value of which is exactly and conclusively fixed by law.⁴⁷ In an Indiana case on this point the defendant had promised to pay the plaintiff and others \$600 in consideration of a promise by them to pay him one cent, and the consideration was held inadequate. "It is true," said the court, "that, as a general proposition, inadequacy of consideration will not vitiate an agreement. But this doctrine does not apply to a mere exchange of sums of money—of coin—whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or perhaps for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay \$600 for one cent, even had the portion of the cent due from the plaintiff been tendered, is an unconscionable contract, void at first blush upon its face, if it be regarded as an earnest one."⁴⁸

In Equity.

Inadequacy of consideration will be taken into account to some extent by courts of equity in the exercise of their peculiar power to compel specific performance of contracts. It has been held that inadequacy of consideration, without more, is ground upon which specific performance may be resisted; but the better doctrine requires that there shall be such gross inadequacy as to shock the conscience, and amount in itself to evidence of fraud.⁴⁹ And if a contract is sought to be

⁴⁶ *Guerand v. Dandele*, 32 Md. 561, 3 Am. Rep. 164; *Pierce v. Fuller*, 8 Mass. 223, 5 Am. Dec. 102; *McClung's Appeal*, 58 Pa. 51; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Linn v. Sigsbee*, 67 Ill. 75; *Grasselli v. Lowden*, 11 Ohio St. 349; *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641.

⁴⁷ *Langd. Cont.* 70; *SCHNELL v. NELL*, 17 Ind. 29, 79 Am. Dec. 453; *SHEPARD v. RHODES*, 7 R. I. 470; *BROOKS v. BALL*, 18 Johns. (N. Y.) 337.

⁴⁸ *SCHNELL v. NELL*, 17 Ind. 29, 79 Am. Dec. 453.

⁴⁹ *Coles v. Trecothick*, 9 Ves. 234; *Conrad v. Schwamb*, 53 Wis. 378, 10 N. W. 395; *Conaway v. Sweeny*, 24 W. Va. 643; *Randolph's Ex'r v. Ouidnick Co.*, 135 U. S. 457, 10 Sup. Ct. 655, 34 L. Ed. 200; *Watson v. Doyle*, 130 Ill. 415, 22 N. E. 613; *Eaton, Eq.* 539. In some states an adequate consideration is required by statute. *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190.

avoided on the ground of fraud or undue influence, the consideration may be inquired into, and inadequacy of consideration will be regarded as corroborative evidence in support of the suit;⁵⁰ but mere inadequacy of consideration alone is not enough to warrant the court's interference.⁵¹

SUFFICIENCY OR REALITY OF CONSIDERATION.

67. Though the consideration need not be adequate to the promise, it must not be illusory or unreal; some benefit must be conferred on the promisor, or some detriment suffered by the promisee.

Reality of Consideration.

Although courts of law will not inquire into the adequacy of consideration, they will insist that it shall not be illusory or unreal. Strictly speaking, what we call an "unreal consideration" is no consideration at all, but this use of the term cannot well mislead. To understand what the law regards as a real and what as an unreal consideration, it will be well to inquire into the various forms which consideration may assume, and to note the grounds upon which certain alleged considerations have been held to be of no real value in the eye of the law.

Forms of Consideration.

The consideration for a promise may be an act or a forbearance, or a promise to do or forbear. When a promise is given for a promise, the contract is said to be made upon an executory consideration. The obligations created by it rest equally upon both parties, each being bound to a future act. An example is in case of mutual promises to marry, in which the consideration for the promise of each is the promise of the other. When the consideration for a promise is an act or forbearance, the contract is said to be made upon a consideration executed. This arises when either the offer or acceptance is signified by one of the parties doing all that he is bound to do under the contract so created.

A contract consisting of mutual promises, so that both parties are bound to some future act or forbearance, is said to be bilateral. A contract in which the offer or acceptance is signified by one of the

⁵⁰ Gifford v. Thorn, 9 N. J. Eq. 702; Grindrod v. Wolf, 38 Kan. 292, 16 Pac. 691; Bowman v. Patrick (C. C.) 36 Fed. 138; Cofer v. Moore, 87 Ala. 705, 6 South. 306; Burke v. Taylor, 94 Ala. 530, 10 South. 129.

⁵¹ Phillips v. Pullen, 45 N. J. Eq. 5, 16 Atl. 9; Jones v. Degge, 84 Va. 685, 5 S. E. 799; Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242; Berry v. Hall, 105 N. C. 154, 10 S. E. 963; Brockway v. Harrington, 82 Iowa, 23, 47 N. W. 1013; Miles v. Iron Co., 125 N. Y. 294, 26 N. E. 261; Bierne v. Ray, 37 W. Va. 571, 16 S. E. 804; Eaton, Eq. 307. And see the cases cited in the preceding note.

parties doing all he is required to do under the agreement, leaving outstanding obligations on the other party only, is said to be unilateral.

SAME—MUTUAL PROMISES—MUTUALITY.

68. A promise is a sufficient consideration for a promise.

69. The promises must be concurrent.

70. The promise may be contingent or conditional, except that—

MUTUALITY—Mutuality of engagement is necessary, and, if the condition or contingency produces want of mutuality, the consideration is insufficient. Both parties must be bound or neither is bound.

It is well settled that a promise is a sufficient consideration for a promise.⁵² In the case of mutual promises to marry, the promise of each party is a sufficient consideration for the promise of the other;⁵³ and so it is in any other case of mutual promises, provided, of course, the promises are to do something of value in the eye of the law. In other words, as a rule, a promise to do a thing is just as valuable a consideration as the actual doing of it would be. After a person had sold and conveyed land, the parties, differing as to the quantity of land embraced in the tract, made an agreement by which the land was to be surveyed, and the grantor should pay for any deficiency, while the grantee should pay for any excess over the acreage mentioned in the deed. It turned out that there was an excess, but the grantee, when sued on his promise to pay therefor, claimed that, as all the land was conveyed by the deed, his promise was without consideration. It was held, however, that the promise of the grantor to pay for any deficiency was a sufficient consideration.⁵⁴

The promises, to constitute a consideration for each other, must be concurrent, or become obligatory at the same time; otherwise each will be without consideration at the time it is made, and both will therefore

⁵² Higgins v. Hill, 56 Law T. R. (N. S.) 426; STRANGBOROUGH AND WARNER'S CASE, 4 Leon. 3; GOWER v. CAPPER, Cro. Eliz. 543; NICHOLS v. RAYNBRED, Hob. 88; Missisquoi Bank v. Sabin, 48 Vt. 239; Buckingham v. Ludlum, 40 N. J. Eq. 422, 2 Atl. 265; Phillips v. Preston, 5 How. 278, 13 L. Ed. 702; Funk v. Hough, 29 Ill. 145; Coleman v. Eyre, 45 N. Y. 38; Briggs v. Tillotson, 8 Johns. (N. Y.) 304; Baker v. Railroad Co., 91 Mo. 152, 3 S. W. 486; Porter v. Rose, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306; Cramer v. Redman (Wyo.) 68 Pac. 1003. Promise to attend a person's funeral in return for promise by the latter to pay money. Earle v. Angell, 157 Mass. 294, 32 N. E. 164.

⁵³ HARRISON v. CAGE, 5 Mod. 411; HOLT v. WARD CLARENCIEUX, 2 Strange, 937.

⁵⁴ SEWARD v. MITCHELL, 1 Cold. (Tenn.) 87; Howe v. O'Mally, 5 N. C. 287, 3 Am. Dec. 693. It would be otherwise if there were no promise by the grantor. Smith v. Ware, 13 Johns. (N. Y.) 259.

be *nuda pacta*.⁵⁵ As explained in treating of offer and acceptance, some time must necessarily elapse between an offer and its acceptance, and in some cases a considerable time may elapse. The offer, however, is considered as continuing during the time allowed for acceptance; and when it is accepted by the giving of a promise both promises become obligatory at the same time, or are concurrent.

A promise which is merely voidable, as in case of an infant, may be a sufficient consideration.⁵⁶ And, as we have seen, an oral promise which is unenforceable within the statute of frauds is generally held to be a good consideration for the promise of the other if he has signed the writing.⁵⁷

Voluntary Subscriptions.

Voluntary subscriptions by a number of persons to promote some object in which they have a common interest—as, for instance, where a number of persons voluntarily promise to pay a certain sum each to found a college—have been said to furnish an illustration of mutual promises. Some courts have sustained them on the ground that the promise of each subscriber is the consideration for the promises of the others.⁵⁸ This ground, however, appears to be untenable, for the reason that as a matter of fact the subscribers, in most cases at least, do not give their promises in consideration of each other.⁵⁹ An additional objection to a recovery by the beneficiary in such cases is that the beneficiary, not being a party to the contract, cannot maintain an action upon it,⁶⁰ except in states which have established the broad rule that a person for whose benefit a promise is made can sue upon it.⁶¹ The liability of the subscriber upon his subscription in such cases is generally enforced, but different courts advance different views in

⁵⁵ NICHOLS v. RAYNBRED, Hob. 88; Keep v. Goodrich, 12 Johns. (N. Y.) 397; Tucker v. Woods, 13 Johns. (N. Y.) 190, 7 Am. Dec. 305; Buckingham v. Ludlum, 40 N. J. Eq. 422, 2 Atl. 265.

⁵⁶ HOLT v. WARD CLEMENCEUX, 2 Strange, 937. Post, p. 163.

⁵⁷ Ante, pp. 88, 105.

⁵⁸ Higert v. Asbury University, 53 Ind. 326 (collecting cases); Lathrop v. Knapp, 27 Wis. 214; Trustees of Troy Conference Academy v. Nelson, 24 Vt. 189; Christian College v. Hendley, 49 Cal. 347; Allen v. Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; First Universalist Church v. Pungs, 126 Mich. 670, 86 N. W. 235; Irwin v. University, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. Rep. 727; Waters v. Union Trust Co., 129 Mich. 640, 89 N. W. 687.

⁵⁹ Cottage Street Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286; Culver v. Banning, 19 Minn. 303 (Gil. 260); PRESBYTERIAN CHURCH OF ALBANY v. COOPER, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767.

⁶⁰ PRESBYTERIAN CHURCH OF ALBANY v. COOPER, supra; cf. Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325. Post, p. 351.

⁶¹ Irwin v. Lombard University, supra.

support of their holdings.⁶² By some courts it is held that the subscription is an offer which becomes binding by acceptance when the beneficiary in reliance upon it incurs expense or liability.⁶³ By other courts it is held that when the subscription is accepted there is an implied counter promise on the part of the beneficiary, which is the consideration.⁶⁴ Still other courts sustain the liability of the subscriber on the ground of equitable estoppel arising from the expenditure of money or incurring of liability by the beneficiary in reliance upon the subscription.⁶⁵

Contingent and Conditional Promises—Options.

In bilateral contracts—that is, where the consideration for a promise is a promise—the whole contract may be intended by the parties to be contingent, so that obligation is to arise under it only upon the occurrence of some event or contingency. If A. offers to supply at a certain price such goods as B. may order, and B. promises to pay at that price for such goods as he may order, there is, of course, no contract, for B. has not promised to order any goods, and it is optional with him whether his promise to pay shall ever come into effect.⁶⁶ Both parties must be bound or neither is bound; in other words, there must be mutuality of engagement.⁶⁷ In such a case, indeed, if before

⁶² See 15 Harv. L. R. 312.

⁶³ *SHERWIN v. FLETCHER*, 168 Mass. 413, 47 N. E. 197; *Grand Lodge I. O. G. T. v. Farnham*, 70 Cal. 158, 11 Pac. 592. See, also, *Twenty-Third St. Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. 117, 6 L. R. A. 807; *Town of Grand Isle v. Kinney*, 70 Vt. 381, 41 Atl. 130; *Richelieu Hotel Co. v. Encampment Co.*, 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; *Hodges v. Nalty*, 104 Wis. 464, 80 N. W. 726.

⁶⁴ *Trustees of Maine Cent. Inst. v. Haskell*, 73 Me. 140; *Barnett v. College*, 10 Ind. App. 103, 37 N. E. 427. And see *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325.

⁶⁵ *Beatty's Estate v. College*, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242. See, also, *Irwin v. Lombard University*, 56 Ohio St. 9, 46 N. E. 63, 36 L. R. A. 239, 60 Am. St. Rep. 727; *Simpson Centenary College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74.

⁶⁶ *American Cotton Oil Co. v. Kirk*, 68 Fed. 791, 15 C. C. A. 540; *Rafolovitz v. Tobacco Co.*, 73 Hun. 87, 25 N. Y. Supp. 1036; *CHICAGO & G. E. RY. CO. v. DANE*, 43 N. Y. 240; *Davie v. Mining Co.*, 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; *Teipel v. Meyer*, 106 Wis. 41, 81 N. W. 982; *Dennis v. Slyfield*, 117 Fed. 474, 54 C. C. A. 520.

⁶⁷ *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Ewins v. Gordon*, 49 N. H. 444; *Burnet v. Bisco*, 4 Johns. (N. Y.) 235; *McKinley v. Watkins*, 13 Ill. 140; *L'Amoreux v. Gould*, 7 N. Y. 349, 57 Am. Dec. 524; *Thayer v. Burchard*, 90 Mass. 508; *Smith v. Weaver*, 90 Ill. 392; *Bean v. Burbank*, 16 Me. 458, 33 Am. Dec. 681; *Mers v. Insurance Co.*, 68 Mo. 127; *Stembridge v. Stembridge's Adm'r.*, 87 Ky. 91, 7 S. W. 611; *Shenandoah Val. R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239; *Barker v. Critzer*, 35 Kan. 459, 11 Pac. 382; *Warren v. Costello*, 109 Mo. 338, 19 S. W. 29, 32 Am. St. Rep. 669; *Graybill v. Brugh*, 59 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894; *Wagner v. J. &*

the offer is withdrawn, B. orders goods, A. is bound to sell at the price named.⁶⁵

On the other hand, if A. offers to supply at a certain price all the goods of a certain kind which B. may need in his business for a certain time, and B. promises to buy such goods, the promises are mutually binding;⁶⁶ for although B. may not need the goods, and hence is not absolutely bound to pay, in the event of the contingency of his needing the goods he is bound to buy them of A. So, if the agreement is for the purchase by B. of all or a certain part of all the goods of a certain kind that A. may produce in a certain period.⁷⁰

Somewhat similar in character are the considerations which consist in conditional promises; as, for instance, where a person promises to do something for a reward, but the other party only binds himself to pay the reward upon the happening of an event which may not be under the control of either party. Such would be the case in a building

G. Meakin, 92 Fed. 76, 33 C. C. A. 577; *Morrow v. Express Co.*, 101 Ga. 810, 28 S. E. 998. See, also, cases cited, p. 33, note 77.

⁶⁸ *G. N. RAILWAY CO. v. WITHAM*, L. R. 9 C. P. 16; *Johnston v. Trippe* (C. C.) 33 Fed. 530; *Moses v. McClain*, 82 Ala. 370, 2 South. 741; *Wisconsin, I. & N. Ry. Co. v. Braham*, 71 Iowa, 484, 32 N. W. 392; *Davis v. Robert*, 89 Ala. 402, 8 South. 114, 18 Am. St. Rep. 126; *Ross v. Parks*, 93 Ala. 153, 8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47; *Thayer v. Burchard*, 99 Mass. 508; *COOPER v. WHEEL CO.*, 94 Mich. 272, 54 N. W. 39, 34 Am. St. Rep. 341. See, also, *Michigan Bolt & Nut Works v. Steel*, 111 Mich. 153, 69 N. W. 241. Filing of bill by vendee for specific performance has been held to supply mutuality. *Dynan v. McColloch*, 46 N. J. Eq. 11, 18 Atl. 822. But most of the cases are to the contrary. See cases cited ante, note 67.

⁶⁹ See *Sheffield Furnace Co. v. Coke Co.*, 101 Ala. 446, 14 South. 672; *WELLS v. ALEXANDRE*, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Smith v. Morse*, 20 La. Ann. 220; *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; *Hickey v. O'Brien*, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227; *E. G. Dailey Co. v. Can Co.*, 128 Mich. 591, 87 N. W. 761. *Manhattan Oil Co. v. Lubricating Co.*, 113 Fed. 923, 51 C. C. A. 553; *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549, 93 N. W. 459; *Loudenback Fertilizer Co. v. Phosphate Co.*, 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402. Contra, *Bailey v. Austrian*, 19 Minn. 535 (Gil. 465). An agreement by a wholesale dealer to supply a retailer, which leaves it practically optional to increase or diminish his orders with the rise or fall of prices, held void for want of mutuality. *Crane v. C. Crane & Co.*, 105 Fed. 869, 45 C. C. A. 96. See, also, *Cold Blast Transp. Co. v. Bolt & Nut Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696.

⁷⁰ *McCall Co. v. Icks*, 107 Wis. 232, 83 N. W. 300. See, also, *Burgess Sulphite Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367; *Brawley v. U. S.*, 96 U. S. 168, 24 L. Ed. 622; *Lobenstein v. U. S.*, 91 U. S. 324, 23 L. Ed. 410; *Grant v. U. S.*, 7 Wall. 331, 19 L. Ed. 194. Where land was agreed to be sold, and the title was defective, by reason of a suit to set aside a will under which the vendor claimed, an agreement to postpone execution of the contract until determination of the suit was sustained on the ground that the vendee would be bound to accept the title if the will should be sustained. *Halé v. Cravener*, 128 Ill. 408, 21 N. E. 534. See ante, p. 45, note 132.

contract where the promise to pay for the work to be done is made conditional upon the approval of the architect. Again, the promise may be conditional on something happening, as in case of promises in a charter party which are not to take effect if certain specified risks occur. In the one case the promise depends for its fulfillment upon a condition precedent; in the other it is liable to be defeated by a condition subsequent. In neither case does its conditional character prevent it from forming a sufficient consideration for promises given in return. These cases are for consideration in a subsequent chapter.

SAME—FORBEARANCE TO EXERCISE A RIGHT.

- 71. Forbearance or a promise to forbear from doing what one is otherwise entitled to do is a sufficient consideration.**
- 72. Forbearance or a promise to forbear from doing what one cannot legally do is no consideration; but if a right is doubtful, so that there are reasonable grounds for trying to enforce it, forbearance is a sufficient consideration.**
- 73. COMPROMISE.** Where the forbearance is in the compromise of a disputed claim made or action brought in good faith (and on reasonable grounds),* forbearance to insist or sue on the claim, or further to prosecute the action, is a sufficient consideration without regard to the validity of the claim.

Consideration may consist in a forbearance or promise to forbear from doing what one is otherwise entitled to do; as, for instance, where a person abstains from the use of liquor and tobacco, on another's promise to pay him money.⁷¹ The abandonment of any right, or a promise to forbear from exercising it, is a sufficient consideration for a promise.⁷² The right may be legal or equitable, certain or doubtful; and it may exist against the promisor or against a third party.⁷³ A

*As to the qualification introduced by the words in parentheses, post, p. 124.

⁷¹ Ante, pp. 113, 114.

⁷² *Blake v. Peck*, 11 Vt. 483; *Leverenz v. Haines*, 32 Ill. 357; *Woodburn v. Woodburn*, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Marshalltown Stone Co. v. Manufacturing Co.*, 114 Iowa, 574, 87 N. W. 496; *Waters v. White*, 75 Conn. 88, 52 Atl. 401. Agreement between attachment creditors of a debtor. *Mygatt v. Tarbell*, 78 Wis. 351, 47 N. W. 618; *Doan v. Dow*, 8 Ind. App. 324, 35 N. E. 709; *Brownell v. Harsh*, 29 Ohio St. 631. Forbearance to contest will. *Rector, etc., of St. Mark's Church, v. Teed*, 120 N. Y. 583, 24 N. E. 1014. The release by a person of a claim, in good faith, of a future contingent interest in certain land under the will of a deceased ancestor, is a sufficient consideration for a note given therefor, whether he in fact had any interest in the land or not. *Brooks v. Wage*, 85 Wis. 12, 54 N. W. 997. Release of mortgage. *Norris v. Vosburgh*, 98 Mich. 426, 57 N. W. 264.

⁷³ Release by wife of inchoate right of dower will support a promise by her husband's grantee to pay her money. *Worley v. Sipe*, 111 Ind. 238, 12 N. E.

creditor, if he extends the time for payment of the debt, gives up a right, and so furnishes a consideration for an additional promise by the debtor,⁷⁴ or for the promise of a third party to guaranty or pay the debt.⁷⁵ So, also, the discharge of a debtor from the debt,⁷⁶ or from lawful imprisonment for the debt,⁷⁷ is a consideration for the promise of a third person to pay the debt; and the surrender or cancellation of a note or mortgage is a consideration for a new note or mortgage.⁷⁸

It has been held that agreement to forbear is necessary, and that mere forbearance to sue, for instance, without any agreement to that effect, is not a sufficient consideration for the promise of another to pay the debt of the person liable, though the act of forbearance may have been induced by the promise;⁷⁹ but upon principle it seems that actual forbearance upon request and in reliance upon the promise is sufficient.⁸⁰

A common form in which a forbearance appears as the consideration for a promise is in the settlement or compromise of a disputed claim. Forbearance by a person to insist upon a demand, or to prosecute an action which he has commenced, is, subject to exceptions to be presently explained, a sufficient consideration.⁸¹

385. Release of inchoate right of homestead in public lands will support a promise. *McCabe v. Caner*, 68 Mich. 182, 35 N. W. 901. And see *Paxton Cattle Co. v. Bank*, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852.

⁷⁴ *Lipsmeier v. Vehslage* (C. C.) 29 Fed. 175; *Martin v. Nixon*, 92 Mo. 26, 4 S. W. 503; *Van Gorder v. Bank* (Pa.) 7 Atl. 144; *Brown v. Bank*, 115 Ind. 572, 18 N. E. 56; *Lundberg v. Elevator Co.*, 42 Minn. 37, 43 N. W. 685; *Sanders v. Smith* (Miss.) 5 South. 514; *Fraser v. Backus*, 62 Mich. 540, 29 N. W. 92; *Lodge v. Hulings*, 63 N. J. Eq. 159, 51 Atl. 1015.

⁷⁵ *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Bank of New Hanover v. Bridgers*, 98 N. C. 67, 3 S. E. 826, 2 Am. St. Rep. 317; *Meyers v. Hockenbury*, 34 N. J. Law, 346.

⁷⁶ *Whitney v. Clary*, 145 Mass. 156, 13 N. E. 393; *Fulton v. Loughlin*, 118 Ind. 286, 20 N. E. 796.

⁷⁷ *SMITH v. MONTEITH*, 13 Mees. & W. 427.

⁷⁸ *Constant v. University*, 111 N. Y. 604, 19 N. E. 631, 2 L. R. A. 734, 7 Am. St. Rep. 769; *Erie Co. Sav. Bank v. Coit*, 104 N. Y. 532, 11 N. E. 54.

⁷⁹ *MANTER v. CHURCHILL*, 127 Mass. 31. And see *Mecorney v. Stanley*, 8 Cush. (Mass.) 85; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403.

⁸⁰ *CREARS v. HUNTER*, 19 Q. B. Div. 341. And see *STRONG v. SIEFF-FIELD*, 144 N. Y. 392, 39 N. E. 330; *Waters v. White*, 75 Conn. 88, 52 Atl. 401.

⁸¹ *McKinley v. Watkins*, 13 Ill. 140; *COOK v. WRIGHT*, 1 Best & S. 559; *CALLISHER v. BISCHOFFSHEIM*, L. R. 5 Q. B. 449; *McClellan v. Kennedy*, 8 Md. 247; *LONGRIDGE v. DORVILLE*, 5 Barn. & A. 117; *Jones v. Rittenhouse*, 87 Ind. 348; *Fisher v. May's Heirs*, 2 Bibb (Ky.) 448, 5 Am. Dec. 626; *Hennessy v. Bacon*, 137 U. S. 85, 11 Sup. Ct. 17, 34 L. Ed. 605; *Sisson v. City of Baltimore*, 51 Md. 83; *CROWTHER v. FARRER*, 15 Q. B. 677; *NASH v. ARMSTRONG*, 10 C. B. (N. S.) 259; *Heffelfinger v. Hummel*, 90 Iowa, 311, 57 N. W. 872; *McClure v. McClure*, 100 Cal. 339, 34 Pac. 822. The suit need

Illustrations are furnished by cases in which one party makes a claim or demand on another, and the latter disputes it, whereupon they settle the dispute by a compromise, or by agreeing upon the amount due in an account stated. The promise to pay the amount settled upon is supported by a sufficient consideration, and may be enforced, though the promisor might be able to prove that nothing was in fact due from him.⁸² A compromise will support a promise by a third party.⁸³

Time of Forbearance.

Questions have been raised as to the length of time over which a forbearance to sue must extend in order to constitute a consideration. It has even been held that a promise of forbearance for an unspecified time was insufficient,⁸⁴ but it is now settled that a promise of forbearance need not be a promise of absolute forbearance, nor even of forbearance for a definite time. Where no time is mentioned, a reasonable time will be implied, or, at any rate, where there is a promise to forbear, and actual forbearance for a reasonable time, it is enough.⁸⁵

Forbearance to do What One Cannot Legally do.

It is no consideration for a promise for a man to forbear or to promise to forbear from doing what he is not legally entitled to do.⁸⁶ This

not be actually discontinued before suit on the promise. The agreement ends it. *Phillips v. Pullen*, 50 N. J. Law, 439, 14 Atl. 222; *Van Campen v. Ford*, 53 Hun, 636, 6 N. Y. Supp. 139; *Rappanier v. Bannon* (Md.) 8 Atl. 555.

⁸² *Grandin v. Grandin*, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642; *DUNHAM v. GRISWOLD*, 100 N. Y. 224, 3 N. E. 76; *Korne v. Korne*, 30 W. Va. 1, 3 S. E. 17; *Neibles v. Railway Co.*, 37 Minn. 151, 33 N. W. 332; *Honeyman v. Jarvis*, 79 Ill. 318; *Potts v. Polk Co.*, 80 Iowa, 401, 45 N. W. 775; *Prout v. Fire Dist.*, 154 Mass. 450, 28 N. E. 679; *Dovale v. Ackermann*, 2 App. Div. 404, 37 N. Y. Supp. 959. And see post, p. 124.

⁸³ *Bane's Case* (1611) 9 Coke, 93b. Withdrawal of a suit against a person, for instance, will support his father's note. *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170.

⁸⁴ *Seiple v. Pink*, 1 Exch. 74. See *Payne v. Wilson*, 7 Barn. & C. 423.

⁸⁵ *OLDERSHAW v. KING*, 2 Hurl. & N. 399, 517; *ALLIANCE BANK v. BROOM*, 2 Drew. & S. 289; *Howe v. Taggart*, 133 Mass. 284; *Elting v. Vanderlyn*, 4 Johns. (N. Y.) 237; *Bowen v. Tipton*, 64 Md. 275, 1 Atl. 861; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Moore v. McKenney*, 83 Me. 80, 21 Atl. 749, 23 Am. St. Rep. 753; *Foard v. Grinter's Ex'rs* (Ky.) 18 S. W. 1034; *TRADERS' NAT. BANK v. PARKER*, 130 N. Y. 415, 29 N. E. 1094; *Citizens' Sav. Bank & Trust Co. v. Babbitts' Estate*, 71 Vt. 182, 44 Atl. 71; *McMicken v. Safford*, 197 Ill. 540, 64 N. E. 540. But see *Garnett v. Kirkman*, 33 Miss. 389; *Clark v. Russell*, 3 Watts (Pa.) 213, 27 Am. Dec. 348.

⁸⁶ In *BARNARD v. SIMONS* (1616) 1 Rolle, Abr. 26, Langd. Cas. Cont. 194, it was said that "if A. makes a void assumpsit to B., and afterwards a stranger comes to B., and, in consideration that B. will relinquish the assumpsit made to him by A., he promises to pay him £10, this is not a good consideration to charge him, because the first assumpsit was void." See *Palfrey v. Railroad Co.*, 4 Allen (Mass.) 55; *Shuder v. Newby*, 85 Tenn. 348, 3 S. W. 438; *Clark v. Jones*, 85 Ala. 127, 4 South. 771; *Sharpe v. Rogers*, 12 Minn. 174

proposition would seem to be obvious, but questions have arisen in its application, and have given rise to some conflict in the decisions.

Some applications of the principle are clear. A forbearance or promise to forbear, for instance, from claims under an illegal contract, such as a gambling contract, or a contract involving the commission of crime, can form no consideration for the promise of the other party, since the contract is void, and could not be enforced.⁸⁷ So, also, the release of a debtor from imprisonment was held to be no consideration for a promise where, by the previous release of a codebtor, the debt had been discharged, since the imprisonment was therefore unlawful.⁸⁸ So a promise to pay rent, made solely to prevent an unlawful eviction, is without consideration.⁸⁹

As a general rule, it is safe to say that, in order that forbearance to exercise a right may constitute a consideration, the right must be at least doubtful. Forbearance to insist upon a claim that is clearly unenforceable, at least if it be known to the claimant to be such, cannot be a consideration.

Compromises.

In respect to compromises of disputed claims and actions, the authorities are all agreed that the promisee must believe in his claim, or in his action; and that forbearance to sue on a demand known to be unenforceable, or to proceed in an action knowingly brought without cause, is no consideration.⁹⁰ When we reach this point, the difficulty begins. In a leading English case it was said: "If he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to do so will constitute a good consideration. When such a person forbears to sue, he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. * * * It would be another matter if a person made a

(Gil. 103); *Harris v. Cassady*, 107 Ind. 158, 8 N. E. 29; *Ecker v. McAllister*, 54 Md. 369; *Schroeder v. Fink*, 60 Md. 438; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *Martin v. Black*, 20 Ala. 309; *Prater v. Miller*, 25 Ala. 320, 60 Am. Dec. 521; *Davison v. Ford*, 23 W. Va. 617; *Eblin v. Miller's Ex'rs*, 78 Ky. 371. Many of these cases, however, in conflict with what is perhaps the prevailing rule, maintain that forbearance to sue on an invalid claim, though honestly believed in, is no consideration. Post, p. 125.

⁸⁷ *Everingham v. Meighan*, 55 Wis. 354, 13 N. W. 269.

⁸⁸ *HERRING v. DORELL*, 8 Dowl. Pr. Cas. 604.

⁸⁹ *Smith v. Coker*, 110 Ga. 654, 36 S. E. 107; *TOLHURST v. POWERS*, 133 N. Y. 460, 31 N. E. 326 [surrender of what promisee has no right to retain].

⁹⁰ *WADE v. SIMEON*, 2 C. B. 548; *McKinley v. Watkins*, 13 Ill. 140; *Rood v. Jones*, 1 Doug. (Mich.) 188; *McGlynn v. Scott*, 4 N. D. 18, 58 N. W. 460; *Phillips v. Pullen*, 50 N. J. Law, 439, 14 Atl. 222; *Von Brandenstein v. Ebenberger*, 71 Tex. 267, 9 S. W. 153; *Demars v. Manufacturing Co.*, 37 Minn. 418, 35 N. W. 1; *Taylor v. Weeks*, 129 Mich. 233, 88 N. W. 466.

claim which he knew to be unfounded, and by a compromise derived an advantage under it; in that case his conduct would be fraudulent."⁹¹ And in a later case it was said: "If there is in fact a serious claim honestly made, the abandonment of the claim is a good consideration. * * * Now, by 'honest claim,' I think is meant this: that a claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know facts, to his knowledge unknown to the other party, which show that his claim is a bad one."⁹² These cases thus allow the whole question to depend on the good faith of the party forbearing, without any regard whatever to the validity of his claim.

Admitting that forbearance from what one is not legally entitled to do is no consideration, it may be said that one has a right to assert or litigate a claim in which he believes, and that forbearance from this right is a consideration.

The English rule is supported by many of the American decisions,⁹³ although many of them insist that there must be reasonable ground for belief in the validity of the claim.* Some cases, however, appear to hold that forbearance to prosecute an invalid claim, though honestly believed in, is no consideration.**

⁹¹ *CALLISHER v. BISCHOFFSHEIM*, L. R. 5 Q. B. 449. See, also, *COOK v. WRIGHT*, 1 B. & S. 559.

⁹² *MILES v. NEW ZEALAND, ETC., CO.*, 32 Ch. D. 266, per Cotton, L. J.

⁹³ *Crans v. Hunter*, 28 N. Y. 389; *Zoebisch v. Von Minden*, 120 N. Y. 406, 24 N. E. 795; *Grandin v. Grandin*, 49 N. J. Law, 9 Atl. 756, 60 Am. Rep. 642; *Rue v. Meirs*, 43 N. J. Eq. 377, 12 Atl. 369; *BELLOWS v. SOWLES*, 55 Vt. 391, 45 Am. Rep. 291; *Hewett v. Currier*, 63 Wis. 386, 23 N. W. 884; *Appeal of Gormley*, 130 Pa. 467, 18 Atl. 727; *Hansen v. Gaar, Scott & Co.*, 63 Minn. 94, 65 N. W. 254; *Di Iorio v. Di Brasio*, 21 R. I. 208, 42 Atl. 1114; *Hanchett v. Ives*, 171 Ill. 122, 49 N. E. 206; *Rowe v. Barnes*, 101 Iowa, 302, 70 N. W. 197; *GALUSHA v. SHERMAN*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

**Mulholland v. Bartlett*, 74 Ill. 58; *Bates v. Sandy*, 27 Ill. App. 552; *United States Mortgage Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88; *Russell v. Wright*, 98 Ala. 652, 13 South. 594; *FINK v. SMITH*, 170 Pa. 124, 32 Atl. 566, 50 Am. St. Rep. 750.

***Palfrey v. Railroad Co.*, 4 Allen, 55; *Schroeder v. Fink*, 60 Md. 436; *Emmitsburg R. v. Donoghue*, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; *Davison v. Ford*, 23 W. Va. 613; *CLINE v. TEMPLETON*, 78 Ky. 550; *GUNNINGS v. ROYAL*, 59 Miss. 45, 42 Am. Rep. 350; *Price v. Bank*, 62 Kan. 743, 64 Pac. 639.

SAME—DOING WHAT ONE IS BOUND TO DO.

74. IN GENERAL. Doing or promising what one is already legally bound to do is, as a rule, no consideration. Such previous obligation may arise

- (a) By virtue of a prior contract, or
- (b) By law, independently of contract.

75. ADDITIONAL COMPENSATION. In some jurisdictions, a promise to perform, or performance of, an existing contract, is held to be consideration for a promise by the other party to pay additional compensation; and in some jurisdictions such promise to perform or performance is held to be consideration for a promise by a third person to pay additional compensation.

76. Under the general rule, payment of part of a debt is no consideration for a discharge of the debt.

Another form of unreality of consideration is where the alleged consideration is a promise to do, or actually doing, what a person is already bound to do. The promisor gets no more in return for his promise than the promisee was already bound to give, and therefore receives no consideration.⁹⁴ Such prior obligation may arise (1) from a previous contract, or (2) from law, independently of contract.

⁹⁴ *Conover v. Stillwell*, 34 N. J. Law, 54; *Jennings v. Chase*, 10 Allen (Mass.) 526; *WARREN v. HODGE*, 121 Mass. 106; *SCHULER v. MYTON*, 48 Kan. 282, 29 Pac. 163; *Holmes v. Boyd*, 90 Ind. 332; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171; *Harris v. Cassaday*, 107 Ind. 158, 8 N. E. 29; *Stuber v. Schack*, 83 Ill. 191; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Harriman v. Harri-man*, 12 Gray (Mass.) 341; *Tucker v. Bartle*, 85 Mo. 114; *Eblin v. Miller's Ex'rs*, 78 Ky. 371; *Sherwin v. Brigham*, 39 Ohio St. 137; *Watts v. Frenche*, 19 N. J. Eq. 407; *Bush v. Rawlins*, 89 Ga. 117, 14 S. E. 886; *Jenness v. Lane*, 26 Me. 475; *Wendover v. Baker*, 121 Mo. 273, 25 S. W. 918; *AREND v. SMITH*, 151 N. Y. 502, 45 N. E. 872; *Allen v. Plasmeyere* (Neb.) 90 N. W. 1125; *Bar-ringer v. Ryder*, 119 Iowa, 121, 93 N. W. 56; *Westcott v. Mitchell*, 95 Me. 377, 50 Atl. 21. On this principle, a promise by a creditor after maturity of the debt, to extend the time of payment, is not binding unless some collateral consideration is received. *Hoffman v. Coombs*, 9 Gill (Md.) 284; *Turnbull v. Brock*, 31 Ohio St. 649; *Pfeiffer v. Campbell*, 111 N. Y. 631, 19 N. E. 498; *Holmes v. Boyd*, 90 Ind. 332; *Ives v. Bosley*, 35 Md. 262, 6 Am. Rep. 411; *Helms v. Crane*, 4 Tex. Civ. App. 89, 23 S. W. 392; *Skinner v. Mining Co.* (C. C.) 96 Fed. 735. A promise to extend in consideration of a promise to pay the debt with interest at the same rate is without consideration. *Kellogg v. Olmstead*, 25 N. Y. 189; *Olmstead v. Latimer*, 158 N. Y. 313, 53 N. E. 5, 43 L. R. A. 685; *Wilson v. Powers*, 130 Mass. 127; *Holmes v. Boyd*, 90 Ind. 332; *Price v. Mitchell*, 23 Wash. 742, 63 Pac. 514.

It has been held, however, that a promise to extend is supported by a promise to pay interest at the same, or even a less rate, for a certain time, since the debtor foregoes his right to pay before that time. *Fawcett v. Freshwater*, 31 Ohio St. 637; *Fowler v. Brooks*, 13 N. H. 240; *Simpson v. Evans*, 44 Minn. 419, 46 N. W. 908. See, also, *Moore v. Redding*, 69 Miss. 841, 13 South. 849.

Where, for instance, a seaman deserted a vessel, and the captain promised the rest of the crew extra pay if they would work the vessel home, the promise was held to be without consideration, because the seamen had, before sailing, agreed to do all they could under all the emergencies of the voyage, and the desertion by some of the seamen was an emergency. Here the seamen promised no more than their contract bound them to do.⁹⁵ Where a public officer is required by law to make an arrest, a promise by an individual to pay him for doing so is without consideration;⁹⁶ and so it is with a promise to pay a public officer or a witness extra compensation for performing services for which his fees are fixed by law.⁹⁷ In these cases the officer or witness does no more than he is required by law to do, and therefore gives no consideration. Of course, it is otherwise with agreements to pay officers for doing something beyond the scope of their official duties.⁹⁸ The doctrine also applies to a promise to do or doing what one may be compelled to do in equity.⁹⁹ It will be seen from the cases mentioned that the actual performance of that which a man is legally bound to do stands on the same footing as his promise to do what he is legally compellable to do.

The rule above stated would seem to be an obvious result of the doctrine of consideration, but some of its applications have met with severe criticism, and there is much direct conflict in the decisions on the subject.

Mutual Discharge and Substituted Agreement—Additional Compensation.

In the case of a contract which is wholly executory,—that is, a contract in which there is something to be done on both sides,—it can, as we shall see in treating of discharge of contract, be discharged by

⁹⁵ *STILK v. MEYRICK*, 2 Camp. 317. See, also, *Harris v. Carter*, 3 El. & Bl. 559; *BARTLETT v. WYMAN*, 14 Johns. (N. Y.) 260; *VANDERBILT v. SCHREYER*, 91 N. Y. 392. It would have been different if risks had arisen which were not contemplated by the contract. For instance, such a contract as in the case cited contains an implied warranty that the ship shall be seaworthy. So, where a seaman had signed articles of agreement to navigate a vessel, and the vessel proved unseaworthy, a promise of extra pay to induce him to abide by his contract was held binding. *Turner v. Owen*, 3 Fost. & F. 177.

⁹⁶ *SMITH v. WHILDIN*, 10 Pa. 39, 49 Am. Dec. 572; *Hogan v. Stophlet*, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809. See post, p. 283.

⁹⁷ See *Lucas v. Allen*, 80 Ky. 681; *Hatch v. Mann*, 15 Wend. (N. Y.) 45. Since a witness, however, cannot be compelled to attend in another state, a party's promise of extra compensation to induce him to attend is binding. *Armstrong v. Prentice*, 86 Wis. 210, 56 N. W. 742.

⁹⁸ *ENGLAND v. DAVIDSON*, 11 Adol. & E. 856; *McCandless v. Steel Co.*, 152 Pa. 139, 25 Atl. 579; *Studley v. Ballard*, 169 Mass. 295, 47 N. E. 1000, 61 Am. St. Rep. 286.

⁹⁹ *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224.

mutual consent. The acquittance of each from the other's claims in such a case is the consideration of each to waive his own.¹⁰⁰ If parties can so discharge the contract, it follows that they may substitute a new contract in its place. Suppose, however, that one of the parties to a contract refuses to perform, because he finds that he must suffer a loss by performance; and suppose the other party wishes performance, and requires it to prevent serious loss. Would a promise, made by him in order to induce the other to perform, of more than he was liable to pay or do under the original contract, be binding, or would it be void, on the ground that the only consideration for it is the promise by the other to perform the original contract,—a thing which he was already bound to do? The courts differ in their answers to this question. Some of them hold that the promise is without consideration and void.¹⁰¹

This, on principle, would seem to be the proper doctrine, but many courts hold outright that, even where there is nothing more than refusal on the part of one party to perform, a new agreement, in which the other, to induce him not to break, but to go on with, his contract, promises to pay him a larger sum than originally promised, at least if it is in substitution of the original contract, is binding.¹⁰² Some of the courts base their decision on the ground that a person who has entered into a contract is entitled to choose between going on with it at a loss and the risk of an action by the other party for the breach. This might be a sound doctrine if a contract were, according to Mr. Justice O. W. Holmes, Jr.'s, conception of it, the mere taking of a risk; that is, if a party must be held to contemplate, when he gives a promise, not its performance, but the payment of damages for its breach, or

¹⁰⁰ Post, p. 420.

¹⁰¹ *VANDERBILT v. SCHREYER*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328; *Erb v. Brown*, 69 Pa. 216; *AYRES v. RAILWAY CO.*, 52 Iowa. 478, 3 N. W. 522; *McCarthy v. Association*, 61 Iowa, 287, 16 N. W. 114; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *KEITH v. MILES*, 39 Miss. 442, 77 Am. Dec. 685; *Gaar, Scott & Co. v. Green*, 6 N. D. 48, 68 N. W. 318; *Jones v. Risle*, 91 Tex. 1, 32 S. W. 1027; *Main St. & A. P. R. Co. v. Traction Co.*, 129 Cal. 301, 61 Pac. 937; *Westcott v. Mitchell*, 95 Me. 377, 50 Atl. 21; *Alaska Packers' Ass'n v. Domenico*, 117 Fed. 99, 54 C. C. A. 485. See, also, *King v. Railway Co.*, 61 Minn. 482, 63 N. W. 1105, which holds that the promise in such case is without consideration, unless the refusal was induced by substantial and unforeseen difficulties, which would cast upon the party additional burdens not anticipated when the contract was made.

¹⁰² *MUNROE v. PERKINS*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; *ROLLINS v. MARSH*, 128 Mass. 116; *Osborne v. O'Reilly*, 42 N. J. Eq. 467, 9 Atl. 209; *Moore v. Detroit Loc. Works*, 14 Mich. 266; *GOEBEL v. LINN*, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; *COYNER v. LYNDE*, 10 Ind. 282; *Cooke v. Murphy*, 70 Ill. 96; *Connelly v. Devoe*, 37 Conn. 570; *Lawrence v. Davey*, 28 Vt. 264; *LATTIMORE v. HARSEN*, 14 Johns. (N. Y.) 330; *Foley v. Storrie*, 4 Tex. Civ. App. 377, 23 S. W. 442.

performance, at his option, according as the one or the other may see the more to his interest in the light of future developments. Such, however, does not seem the proper conception of contract. Certainly, as a rule, when a man makes a contract, he does so with the intention of performing it, and with the expectation of performance by the other party. It cannot be that a contract is nothing more than a mere gambling transaction,—a mere bet on its performance. To allow a man who has promised, on a sufficient consideration, to repudiate his promise when he finds that he is to suffer loss, and force the other party to pay an additional sum in order to obtain what he is already entitled to, encourages breach of contract and breach of faith.

As we shall presently see, a different rule than that stated at the beginning of this paragraph applies where the contract is wholly executed on one side.

Promise to Third Person to Perform Existing Contract.

In England and Massachusetts it has been held that if a man is bound by a contract to do a particular thing, and, while it is doubtful whether he will do it, a third person promises to pay him if he will do it, his performance will constitute a sufficient consideration for the third party's promise.¹⁰³ It is difficult, if not impossible, to reconcile such a case with the general rule which we have stated, or to find any reason for such an exception. In this country the contrary has been generally held.¹⁰⁴

Part Payment in Satisfaction of Debt.

Under the rule we have been discussing, the simple payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt, for it is doing no more than the debtor is already bound to do, and is therefore no consideration for the creditor's promise to forego the residue.¹⁰⁵ If, for instance, a person owes another \$1,000, the

¹⁰³ *Shadwell v. Shadwell*, 9 C. B. (N. S.) 159; *Scotson v. Pegg*, 6 Hurl. & N. 295; *ABBOTT v. DOANE*, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465; Cf. *Grant v. Railway Co.*, 61 Minn. 395, 63 N. W. 1026. See 12 Harv. L. R. 520.

¹⁰⁴ *JOHNSON'S ADM'R v. SELLERS' ADM'R*, 33 Ala. 265; *Putnam v. Woodbury*, 68 Me. 58; *L'Amoreux v. Gould*, 7 N. Y. 349, 57 Am. Dec. 524; *Peelman v. Peelman*, 4 Ind. 612; *MERRICK v. GIDDINGS*, 1 Mackey (D. C.) 394; *Davenport v. Society*, 33 Wis. 387; *Gordon v. Gordon*, 56 N. H. 170; *Hanks v. Barron*, 95 Tenn. 275, 32 S. W. 195; *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115, 35 N. E. 873. See, also, *Brownlee v. Lowe*, 117 Ind. 420, 20 N. E. 301.

¹⁰⁵ *Pinnel's Case*, 5 Coke, 117a; *Cumber v. Wane*, 1 Strange, 426, 1 Smith. Lead. Cas. 439; *JAFFRAY v. DAVIS*, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710 (collecting cases); *Harriman v. Harriman*, 12 Gray (Mass.) 341; *Bailey v. Day*, 26 Me. 88; *Goodwin v. Follett*, 25 Vt. 386; *Barron v. Vandvert*, 13 Ala. 232; *Hayes v. Insurance Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; *Harrison v. Close*, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444; *BENDER v. BEEN*, 78 Iowa,

payment of which may be demanded at once, a promise by the creditor to take \$500 in full, and its payment, will not prevent his afterwards recovering the other \$500.

This rule has been much criticised,¹⁰⁶ but is well established,¹⁰⁷ although in some states it is subject to exceptions, real or apparent.¹⁰⁸ Thus it has been held that since a person may, if he choose, make a gift to another which when accepted will be irrevocable, a creditor may, on receiving part of the debt, forgive the debtor the residue, and that a receipt in full may be evidence of such forgiveness.¹⁰⁹ In some states the rule has been changed by statute so that acceptance of a less sum in satisfaction of a debt is a discharge.¹¹⁰

Since a contract under seal requires no consideration, a creditor, on receiving part payment of his debt, may release the residue by an instrument under seal.¹¹¹

283, 43 N. W. 216, 5 L. R. A. 649; *Leeson v. Anderson*, 99 Mich. 247, 58 N. W. 72, 41 Am. St. Rep. 597; *Bryan v. Foy*, 69 N. C. 45; *Carlton v. Railroad Co.*, 81 Ga. 531, 7 S. E. 623; *Liening v. Gould*, 13 Cal. 598; *Watts v. Frenche*, 19 N. J. Eq. 407; *Beaver v. Fulp*, 136 Ind. 595, 36 N. E. 418; *Lankton v. Stewart*, 27 Minn. 346, 7 N. W. 360; *Willis v. Gammill*, 67 Mo. 730; *St. Louis, F., S. & W. R. Co. v. Davis*, 35 Kan. 464, 11 Pac. 421; *Reynolds v. Reynolds*, 55 Ark. 369, 18 S. W. 377; *Emmitsburg R. Co. v. Donoghue*, 67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; *Tyler v. Association*, 145 Mass. 134, 13 N. E. 360; *McIntosh v. Johnson*, 51 Neb. 33, 70 N. W. 522. And see cases cited in note 94, supra. For the same reason, a promise to take less than the sum due is also without consideration. *McKenzie v. Culbreth*, 66 N. C. 534; *FOAKES v. BEER*, L. R. 9 App. Cas. 605; *Rose v. Daniels*, 8 R. I. 381; *Smith v. Phillips*, 77 Va. 548; *Bryan v. Brazil*, 52 Iowa, 350, 3 N. W. 117; *Hart v. Strong*, 183 Ill. 349, 55 N. E. 629. Nor is part payment any consideration for an agreement to extend the time for payment of the residue. *Holliday v. Poole*, 77 Ga. 159; *Liening v. Gould*, 13 Cal. 598; *Barron v. Vandvert*, 13 Ala. 232; *Turnbull v. Brock*, 31 Ohio St. 649. And see post, p. 491.

¹⁰⁶ See *Two Theories of Consideration* by Prof. James Barr Ames, 12 Harv. L. R. 515, 525; *Chicago, M. & St. P. Ry. v. Clark*, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099.

¹⁰⁷ The contrary has been held in Mississippi. *CLAYTON v. CLARK*, 74 Miss. 499, 21 South. 565, 37 L. R. A. 771, 60 Am. St. Rep. 521.

¹⁰⁸ One or two cases make an exception where the debtor is insolvent. *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. 415; *Rice v. Mortgage Co.*, 70 Minn. 77, 72 N. W. 826 (believed to be insolvent).

¹⁰⁹ *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458, 8 L. R. A. 257, 17 Am. St. Rep. 638; *Green v. Langdon*, 28 Mich. 121; *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494. See, also, *Lamprey v. Lamprey*, 29 Minn. 151, 12 N. W. 514. A receipt "in full of all demands," given because the other party refused to pay more without it, held binding. *FLYNN v. HURLOCK*, 194 Pa. 462, 45 Atl. 312.

¹¹⁰ *Tiddy v. Harris*, 101 N. C. 589, 8 S. E. 227; *Jones v. Wilson*, 104 N. C. 9, 10 S. E. 79.

¹¹¹ *Bender v. Sampson*, 11 Mass. 42; *Willing v. Peters*, 12 Serg. & R. (Pa.) 177; *Ingersoll v. Martin*, 58 Md. 67, 42 Am. Rep. 322; *Spitze v. Railroad Co.*, 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378.

Same—Consideration for Release of Residue.

The rule that part payment of a debt does not discharge the debtor does not apply where the creditor, in addition to the part payment, receives something else which the law regards of value, or, in other words, where, in the thing done or given, he receives something different in kind from that which he is entitled to demand;¹¹² and if the difference is real, so that something of value is superadded to the part payment, the fact that the difference or the value superadded is slight will make no difference, for, as we have seen, the courts will not determine the adequacy of the consideration. If a man sells and becomes bound to deliver to another two particular horses, delivering one of them will not sustain a promise by the buyer not to require delivery of the other; but it would be otherwise if the buyer agreed to receive some other particular horse or cow in discharge of the contract, though it might be of comparatively little value. A money debt may be discharged by the giving of a negotiable instrument for a less sum than due, or, as said in an old English case, "the gift of a horse, hawk, or robe, etc., in satisfaction, is good; for it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction."¹¹³

If the debtor gives, and the creditor receives, in full satisfaction of the debt, the note of a third person for a smaller sum than the amount of the debt, there is a sufficient consideration for his promise to forego the residue;¹¹⁴ and so it is where the smaller sum agreed to be taken is guarantied, or a note therefor is indorsed, by a third person;¹¹⁵ or where the smaller sum is paid before the debt is due, or at a different place than required by the contract;¹¹⁶ or where a note secured by a mortgage is given for the smaller sum.¹¹⁷

¹¹² JAFFRAY v. DAVIS, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710; Day v. Gardner, 42 N. J. Eq. 199, 7 Atl. 365; Stacy v. Cook, 62 Kan. 50, 61 Pac. 399.

¹¹³ Pinnel's Case, 5 Coke, 117a. And see Hasted v. Dodge (Iowa) 35 N. W. 462.

¹¹⁴ Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Sanders v. Bank, 13 Ala. 353; Hardesty v. Graham (Ky.) 3 S. W. 909. Check of third person. Guild v. Butler, 127 Mass. 386.

¹¹⁵ Steinman v. Magnus, 11 East, 390; Singleton v. Thomas, 73 Ala. 205; Jenness v. Lane, 26 Me. 475; Maddux v. Bevan, 39 Md., at page 499; Boyd v. Hitchcock, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; Varney v. Conery, 77 Me. 527, 1 Atl. 683; Mason v. Campbell, 27 Minn. 54, 6 N. W. 405.

¹¹⁶ Pinnel's Case, 5 Coke, 117a; Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Harper v. Graham, 20 Ohio, 105; SCHWEIDER v. LANG, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; McKenzie v. Culbreth, 66 N. C. 534; Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136; Reid v. Hibbard, 6 Wis. 175; Chicora Fertilizer Co. v. Dunan, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401. Cf. Saunders v. Whitcomb, 177 Mass. 457, 59 N. E. 192.

¹¹⁷ JAFFRAY v. DAVIS, 124 N. Y. 164, 26 N. E. 351, 11 L. R. A. 710; Post v. Bank, 137 Ill. 559, 28 N. E. 978.

Same—Unliquidated Claim.

The rule that payment of less than the amount claimed is no consideration for a discharge applies only when the sum due is definite and certain. The payment of less than the amount claimed, if the sum due is unliquidated, is a good consideration for the release.¹¹⁸ This proceeds upon the ground that the parties have agreed to settle an unliquidated claim, or, in other words, have agreed on an accord and satisfaction of such claim.¹¹⁹

Same—Compromise.

We have already seen, in treating of forbearance as a consideration, that where a demand is made and disputed, or a suit is brought, the parties may enter into a compromise, and that the party upon whom the demand is made or against whom the suit is brought will be bound thereby. The consideration for his promise is the forbearance of the other party to insist on his original demand, or to further prosecute his action.¹²⁰ In such a case the creditor or plaintiff is also bound by the compromise. The settlement of the dispute and definite promise by the debtor is a consideration for his promise to forego any further claim. He cannot disregard the compromise on the ground that the debtor promised only what he was already bound to do.¹²¹

Same—Accord and Satisfaction.

Whether the sum due is certain or uncertain, the consideration for the promise to forego the residue of the debt must be executed. It is not enough that the parties are agreed. Their agreement must be carried out if it is to be an answer to the original cause of action. Where it has been carried out, it is an accord and satisfaction. Where it has not been carried out it is an accord executory. As said in an

¹¹⁸ WILKINSON v. BYERS, 1 Adol. & E. 106; Baird v. U. S., 96 U. S. 430, 24 L. Ed. 703; Goss v. Ellison, 136 Mass. 503; Potter v. Douglass, 44 Conn. 541; Riley v. Kershaw, 52 Mo. 224; Ogborn v. Hoffman, 52 Ind. 439; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Sanford v. Abrams, 24 Fla. 181, 2 South. 373; Berdell v. Bissell, 6 Colo. 162; Stearns v. Johnson, 17 Minn. 142 (Gil. 116); TANNER v. MERRILL, 108 Mich. 58, 65 N. W. 604, 31 L. R. A. 171, 62 Am. St. Rep. 687; NASSOIV v. TOMLINSON, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089; Chicago, M. & St. P. Ry. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099. But see Huff v. Logan (Ky.) 60 S. W. 483.

¹¹⁹ Tompkins v. Hill, 145 Mass. 379, 14 N. E. 177. Post, p. 491.

¹²⁰ Ante, p. 121.

¹²¹ Truax v. Miller, 48 Minn. 62, 50 N. W. 935; Sisson v. City of Baltimore, 51 Md. 83; Ogborn v. Hoffman, 52 Ind. 439; McCall v. Nave, 52 Miss. 494; Union Pac. R. Co. v. Anderson, 11 Colo. 293, 18 Pac. 24; Perkins v. Headley, 49 Mo. App. 556; Gates v. Steele, 58 Conn. 316, 20 Atl. 474, 18 Am. St. Rep. 268; Battle v. McArthur, 49 Fed. 715; Northern Liberty Market Co. v. Kelly, 113 U. S. 199, 5 Sup. Ct. 422, 28 L. Ed. 948; Slade v. Elevator Co., 39 Neb. 600, 58 N. W. 191; Town of Brandon v. Jackson, 74 Vt. 78, 52 Atl. 114; Dunbar v. Dunbar, 180 Mass. 170, 62 N. E. 248, 94 Am. St. Rep. 623.

old case: "Accord executed is satisfaction; accord executory is only substituting one cause of action in the room of another, which might go on to any extent."¹²² This is a subject, however, which relates to the discharge of contract.¹²³

Same—Composition with Creditors.

A composition with creditors, whereby each creditor agrees to receive a certain proportion of the sum due him, seems, at first thought, to be an infraction of the rule that part payment of a debt is no discharge unless there is some consideration in addition to the part payment for the promise to forego the residue. The promise of the debtor to pay, or payment by him, of a portion of the debt, is not the consideration for the promises of the creditors to forego the balance.¹²⁴ The consideration must be and is something more than this.

In a leading English case Parke, J., said: "Here each creditor entered into a new agreement with the defendant [the debtor], the consideration of which, to the creditor, was the forbearance by all the other creditors who were parties, to insist upon their claims."¹²⁵ The view that the promise of each creditor is sustained by the consideration moving from the others has been frequently approved.¹²⁶ It has, however, met with criticism on the ground that the debtor, being a stranger to the consideration, cannot enforce such a contract.¹²⁷ Sir William Anson finds consideration moving from the debtor in his procurement of the promise by the other creditors to forbear.¹²⁸ On one ground or another such agreements are universally sustained.¹²⁹

¹²² LYNN v. BRUCE, 2 H. Bl. 319.

¹²³ Post, p. 491.

¹²⁴ Fitch v. Sutton, 5 East, 230.

¹²⁵ GOOD v. CHEESMAN, 2 Barn. & Adol. 335.

¹²⁶ WILLIAMS v. CARRINGTON, 1 Hilt. (N. Y.) 515; PERKINS v. LOCKWOOD, 100 Mass. 249, 1 Am. Rep. 103; Brown v. Farnham, 48 Minn. 317, 51 N. W. 377. See, also, White v. Kuntz, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886.

¹²⁷ See Huffcutt, Anson, Cont. 108, note 1; Harriman, Cont. § 126.

¹²⁸ Anson, Cont. (8th Ed.) 90.

¹²⁹ Fellows v. Stevens, 24 Wend. 294; Murray v. Snow, 37 Iowa, 410; Cheveront v. Textor, 53 Md. 295, 307; Falconbury v. Kendall, 76 Ind. 260; Robert v. Barnum, 80 Ky. 28; Pierce v. Jones, 8 Rich. (S. C.) 273, 28 Am. Rep. 288; Paddleford v. Thacher, 48 Vt. 574; Boyd v. Hind, 1 Hurl. & N. 938; SLATER v. JONES, L. R. 8 Exch. 193; Stewart v. Langston, 103 Ga. 290, 30 S. E. 35.

SAME—IMPOSSIBILITY AND VAGUENESS.

77. IMPOSSIBLE PROMISE. A promise to do something which is either impossible in law, or physically impossible, is no consideration. The thing must be impossible on its face; not merely improbable, or impossible to the promisor.

78. VAGUE PROMISE. A promise which is so vague and indefinite as to be incapable of enforcement is no consideration.

Impossible Promise.

The courts will also hold a consideration unreal, and therefore no consideration at all, where it is impossible upon its face. As will presently be seen, practical impossibility, unknown to the parties when they entered into their contract, may avoid it on the ground of mistake;¹³⁰ or impossibility of performance, arising subsequent to the making of the contract, may, under some circumstances, operate as a discharge;¹³¹ but we are here concerned with promises to do a thing so obviously impossible that the promise can form no real consideration.

The consideration may be either (1) impossible in law, or (2) physically impossible. Where, for instance, a debtor made a promise to the servant of his creditor in consideration of a promise by the servant to release him from the debt, it was held that there was no consideration for the debtor's promise, as the servant had no power to release the debt.¹³² So, also, an undertaking that another's land shall sell for a given sum on a certain day has been held insufficient to support a promise, on the ground that a person cannot compel the sale of another's property.¹³³ In these cases the consideration is impossible in law. A promise to go from New York to London in a day would be physically impossible, and could form no consideration for a promise given in return.¹³⁴

Impossibility, as used in this connection, does not mean anything more than a *prima facie* legal impossibility or physical impossibility "according to the state of knowledge of the day."¹³⁵ In the first case of legal impossibility mentioned above, the promisor might procure

¹³⁰ Post, p. 201.

¹³¹ Post, p. 472.

¹³² *Harvey v. Gibbons*, 2 Lev. 161. And see *Ward v. Hollins*, 14 Md. 158; *Pierce v. Pierce*, 17 Ind. App. 107, 46 N. E. 480.

¹³³ *STEVENS v. COON*, 1 Pin. (Wis.) 356.

¹³⁴ See *James v. Morgan*, 1 Lev. 111; *Thornborow v. Whiteacre*, 2 Ld. Raym. 1164; *Bennett v. Morse*, 6 Colo. App. 122, 39 Pac. 582. A covenant by an applicant for life insurance that he will not die by his own hand while insane does not create a contract which will defeat recovery on the policy where the insured takes his life while insane, since the covenant was one impossible to observe, and known to be so by both parties. *Kelley v. Insurance Co. (C. C.)* 109 Fed. 56.

¹³⁵ Per Brett, J., *CLIFFORD v. WATTS*, L. R. 5 C. P. 577, 588.

the release of the debt; and, in the second case, he might procure the owner of the land to sell it by the time specified. There is, however, a *prima facie* impossibility, and this is enough. So it may be that, in the future, means may be discovered by which one may be able to travel from New York to London in a day; but, according to the present state of knowledge, it is physically impossible. It was said in a New York case that if the promise be "within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld; as where one covenants it shall rain to-morrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it is only improbable, or out of the power of the obligor, it is not in law deemed impossible."¹³⁶

Vague Promise.

Again, a consideration may be unreal because it is so vague in its terms as to be practically incapable of enforcement. In such case it may be classed with impossible considerations. Where, for instance, in an action on a note given by a son to his father the son pleaded a promise made by his father to discharge him from liability on the note in consideration of his ceasing to make certain complaints, which he had been in the habit of making, to the effect that he had not enjoyed as many advantages as the other children, it was said that the son's promise was no more than a promise "not to bore his father," and it was held too vague to constitute a consideration for the father's promise. "A man," said the court, "might complain that another person used the highway more than he ought to do, and that other might say, 'Do not complain, and I will give you £5.' It is ridiculous to suppose that such promises could be binding."¹³⁷

We have already sufficiently discussed the question of vagueness and uncertainty in agreements.¹³⁸

¹³⁶ BEEBE v. JOHNSON, 19 Wend. 500, 32 Am. Dec. 518, citing 3 Com. Dig. 93; 1 Rolle, Abr. 419. And see Watson v. Blossom (Sup.) 4 N. Y. Supp. 489; CLIFFORD v. WATTS, L. R. 5 C. P. 588; The Harriman v. Emerick, 9 Wall. 161, 19 L. Ed. 629.

¹³⁷ WHITE v. BLUETT, 23 Law J. Exch. 36, 2 Com. Law Rep. 301. And see Ballou v. March, 133 Pa. 64, 19 Atl. 304.

¹³⁸ Ante, p. 43.

LEGALITY OF CONSIDERATION.

79. The consideration, to support a promise, must be legal; and therefore a promise to do or doing what is illegal is no consideration.¹⁸⁹

It is well to state this rule here, as indicating a necessary element in consideration. It will be treated when we come to consider, as an element in the formation of contract, the legality of the objects for which the parties to a contract enter into it.

CONSIDERATION IN RESPECT OF TIME—PAST CONSIDERATION.

80. A consideration may be executory or executed, but it cannot be past, except—

EXCEPTIONS ¹⁴⁰—(a) Where the past consideration was given at the request of the promisor.

(b) Where the promise is to pay for something voluntarily done by the promisee, which the promisor was legally bound to do.

(c) Where a person, by a new promise, revives an agreement by which he has benefited, but which is not void, but voidable or unenforceable against him, by reason of a rule of law, meant for his advantage, which he may waive.

Executory Consideration.

The consideration for a promise is executory when it is a promise given in return to do something in the future. In regard to this, there is nothing to be added to what has already been said with regard to the nature of consideration in general. We have seen that a promise on one side is a good consideration for a promise on the other.

Executed Consideration.

A contract arises upon an executed consideration when one of the parties has, either in the act which amounts to a proposal or to an acceptance, as the case may be, done all that he is bound to do under the contract, leaving an outstanding liability on the other side only. The two forms of consideration thus suggested have been described as (1) acceptance of an executed consideration, and (2) consideration executed upon request.¹⁴¹ They arise when the proposal is an offer of an act

¹⁸⁹ BISHOP v. PALMER, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; Hatch v. Mann, 15 Wend. (N. Y.) 45; Hartley v. Rice, 10 East, 22. See post, p. 234 et seq.

¹⁴⁰ The first two exceptions are doubtful, post pp. 138, 139.

¹⁴¹ Leake, Cont. 23.

for a promise, and the act is accepted; or where it is an offer of a promise for an act, and the act is done.

In the first case a man offers his labor or goods under such circumstances that he obviously expects to be paid for them, and the contract arises when the labor or goods are accepted, the acceptor becoming bound to pay a reasonable price for them.¹⁴² The consideration executed upon request, or the contract which arises on the acceptance by act of the offer of a promise, is best illustrated by the case of an advertisement of a reward for services, which makes a binding promise to give the reward when the service is rendered. Under these circumstances, it is not the offeror, but the acceptor, who has done his part in becoming a party to the contract.¹⁴³ This form of consideration will support an implied as well as an express promise where a man is asked to perform certain services which will entail certain liabilities and expenses. Thus, where a person is employed to deal with property for a certain purpose, and, in the course of the employment, he is compelled to pay duties to the government, he may recover the amount from his employer on an implied promise to repay.¹⁴⁴

Past Consideration.

Strictly, it is a misnomer to speak of a past "consideration," for it is in fact no consideration at all. A past consideration, so called, is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If, afterwards, whether from good feeling or interested motives it matters not, he makes a promise to the person by whom he has been so benefited, and that promise is made upon no other consideration than the past benefit, the promise is gratuitous, and cannot be enforced.¹⁴⁵ Thus, where a person who had previously sold a vicious horse without any warranty, either express or implied, afterwards promised that it was sound and

¹⁴² Ante, p. 15; *Hoadley v. McLaine*, 10 Bing. 482; *Hart v. Mills*, 15 Mees. & W. 87.

¹⁴³ Ante, pp. 15, 38; *ENGLAND v. DAVIDSON*, 11 Adol. & El. 856.

¹⁴⁴ "Whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference." *BRITAIN v. LLOYD*, 14 Mees. & W. 762.

¹⁴⁵ *Anson*, Cont. (8th Ed.) 95; *HUNT v. BATE* (1568) *Dyer*, 272; *Bulkley v. Landon*, 2 Conn. 404; *BARTHOLOMEW v. JACKSON*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358; *Greene v. First Parish in Malden*, 10 Pick. (Mass.) 500; *Williams v. Hathaway*, 19 Pick. (Mass.) 387; *Wilson v. Edmonds*, 24 N. H. 517; *Marsh v. Chown*, 104 Iowa, 556, 73 N. W. 1046; *Stoneburner v. Motley*, 95 Va. 784, 30 S. E. 364. Some of the earlier cases sustained, and many late cases seem to sustain, promises on a past consideration on the ground of moral obligation. *BARNES v. HEDLEY*, 2 Taunt. 184; *LEE v. MUGGERIDGE*, 5 Taunt. 36. See ante, p. 108; post, p. 142.

free from vice, it was held that the promise was not binding for want of consideration.¹⁴⁶ So, also, it has repeatedly been held that services rendered in the past, but not at the express or implied request of the person benefited by them, will not support a promise by him to pay for them.¹⁴⁷ In a Michigan case in which liquor had been sold in violation of a statute, which was afterwards repealed, the court held that, as the contract was void, a promise by the buyer to pay, made after the statute was repealed, in consideration of the sale and of an extension of the time for payment originally agreed upon, was without consideration.¹⁴⁸ So, where the balance of a debt has been voluntarily and effectually released on payment of a part of it, a subsequent promise by the debtor to pay the part released cannot be enforced.¹⁴⁹

Exceptions to the Rule as to Past Consideration.

(1) It is generally declared a past consideration will support a subsequent promise if the consideration was given at the request of the promisor. In *Lampleigh v. Brathwait* the plaintiff sued for money which the defendant had promised to pay him for services rendered previous to the promise, at the defendant's request, but without any promise at the time of the request and of the rendition of the services. The court agreed "that a mere voluntary courtesy will not have consideration to uphold an assumpsit. But, if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit."¹⁵⁰ On principle, it would seem that, unless the services were

¹⁴⁶ *ROSCORLA v. THOMAS*, 3 Q. B. 234.

¹⁴⁷ *MILLS v. WYMAN*, 3 Pick. (Mass.) 207; *BARTHOLOMEW v. JACKSON*, 20 Johns. (N. Y.) 28; *DEARBORN v. BOWMAN*, 3 Metc. (Mass.) 155; *Allen v. Bryson*, 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358; *Osier v. Hobbs*, 33 Ark. 215; *Ellicott v. Turner*, 4 Md. 476.

¹⁴⁸ *Ludlow v. Hardy*, 38 Mich. 690.

¹⁴⁹ *Hale v. Rice*, 124 Mass. 299; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405; *Montgomery v. Lampton*, 3 Metc. (Ky.) 519; *SHEPARD v. RHODES*, 7 R. I. 470, 84 Am. Dec. 573; *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 366. But see *Willing v. Peters*, 12 Serg. & R. (Pa.) 177.

¹⁵⁰ *LAMPLEIGH v. BRAITHWAIT* (A. D. 1615) Hob. 105, 1 Smith, Lead. Cas. 67. And see *SLDENHAM v. WORLINGTON* (1585) 2 Leon. 224; *MARSH v. RAINSFORD* (1588) 2 Leon. 111; *RIGGS v. BULLINGHAM* (1599) Cro. Eliz. 715; *BOSDEN v. SIR JOHN THENNE* (1603) Yelv. 40; *FIELD v. DALE*, 1 Rolle, Abr. 11; *Boothe v. Fitzpatrick*, 36 Vt. 681; *Chaffee v. Thomas*, 7 Cow. (N. Y.) 358; *DEARBORN v. BOWMAN*, 3 Metc. (Mass.) 155; *Comstock v. Smith*, 7 Johns. (N. Y.) 87; *Allen v. Woodward*, 22 N. H. 544; *Goldsbey v. Robertson*, 1 Blackf. (Ind.) 247; *Carson v. Clark*, 2 Ill. 113, 25 Am. Dec. 79; *Lonsdale v. Brown*, 4 Wash. C. C. 148, Fed. Cas. No. 8,494; *Wilson v. Edmonds*, 24 N. H. 517. The previous request may be inferred from the beneficial character of the services, or other consideration, and the other circumstances. *HICKS v. BURHANS*, 10 Johns. (N. Y.) 243; *Oatfield v. Waring*, 14 Johns. (N. Y.) 188; *Wilson v. Edmonds*, 24 N. H. 517. The rule laid down in

rendered under such circumstances that the law would imply a promise to pay what they were worth, a subsequent promise would be without effect, and that in that case the only effect of the subsequent promise would be as evidence of the value of the services.¹⁵¹ In many of the cases, indeed, in which the exception was recognized the subsequent promise was coextensive with that which would have been implied by law. And in view of the repudiation of the doctrine of past consideration, the exception is discredited by modern text-writers.¹⁵² *Lampleigh v. Brathwait* has, however, been followed in several recent cases in this country.¹⁵³

Some cases even go so far as to say that even though the past consideration was rendered without request, yet, if it moved directly from the promisee to the promisor, and inured directly to the promisor's benefit, the subsequent promise is binding;¹⁵⁴ but these cases are doubtful, unless they can be sustained on the ground that the ratification of an unauthorized act is equivalent to a request.¹⁵⁵ It has been held that if the past consideration, though rendered at the request of the other party, was intended by both parties to be gratuitous, the subsequent promise to pay therefor is not supported by a consideration.¹⁵⁶

(2) There is another exception, or possible exception, to the rule in cases where one person has voluntarily done what another person was legally bound to do, and the latter afterwards promises to pay him therefor. The English cases usually cited in support of this rule all turned upon the liability of parish authorities for medical attendance upon paupers who were settled in one parish, but resident in another. It was held in all the cases that a suit could be maintained for services rendered against the parish legally bound to render them, which had, after their rendition, promised to pay for them. Some of the cases seem to base the decision on the ground that the moral obligation rest-

LAMPLEIGH v. BRAITHWAIT was literally adhered to in Ireland in a comparatively late case. **BRADFORD v. ROULSTON**, 8 Ir. C. L. 468. "The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay." Per Holmes, C. J., in *Moore v. Elmer*, 180 Mass. 15, 61 N. E. 259.

¹⁵¹ See *Kennedy v. Brown*, 18 C. B. N. S. 677, per Earle, C. J.

¹⁵² Anson, *Cont.* (8th Ed.) 98-100; Pollock, *Cont.* (3d Ed.) 187; Harriman, *Cont.* § 139.

¹⁵³ *Pool v. Horner*, 64 Md. 131, 20 Atl. 1036; *Stuht v. Sweesy*, 48 Neb. 767, 67 N. W. 748; *Silverthorn v. Wylie*, 96 Wis. 69, 71 N. W. 107; *Montgomery v. Downey*, 116 Iowa, 632, 88 N. W. 810. See, also, *Daily v. Minnick*, 117 Iowa, 563, 91 N. W. 913, 60 L. R. A. 840.

¹⁵⁴ *Boothe v. Fitzpatrick*, 36 Vt. 681; *Seymour v. Town of Marlboro*, 40 Vt. 171; *Doty v. Wilson*, 14 Johns. (N. Y.) 378.

¹⁵⁵ *Post*, p. 140, note 161.

¹⁵⁶ *Allen v. Bryson*, 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358; *Osier v. Hobbs*, 33 Ark. 215.

ing on the parish was sufficient to support its promise;¹⁵⁷ but, as we have seen, moral obligations cannot form a consideration.¹⁵⁸ Other cases seem to go on the ground that there was a legal obligation resting on the parish of residence to do that which the parish of settlement might legally have been compelled to do, and that a quasi contractual relation thus arose between the parties; or that there was knowledge on the part of the defendant parish of acts from which a contract might be implied, independent of the subsequent promise.¹⁵⁹ There is, to say the least, much doubt in regard to this exception.¹⁶⁰ In a Massachusetts case, however, in which the plaintiff had, without a prior request, paid money which the defendant was legally bound to pay, the court held that a subsequent promise by the defendant to reimburse him was "equivalent to a previous request," on "the well-established principle that the subsequent ratification of an act done by a voluntary agent of another, without authority from him, is equivalent to a previous authority."¹⁶¹

(3) The third exception, or apparent exception, to the rule that a past consideration will not support a promise is a substantial and important one, and one about which there is no doubt. It is found in those cases in which a person has been held capable of reviving an agreement by which he has benefited, but which, by reason of some rule of law meant for his advantage, which he may waive, is not enforceable against him. The principle upon which these cases rest is "that, where the consideration was originally beneficial to the party promising, yet, if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law, and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it."¹⁶² Thus a new promise made by a bankrupt or insolvent who has been discharged from debts by a certificate of bankruptcy, or by insolvency proceedings, to pay a debt, has been upheld without further consideration.¹⁶³ So a promise by a person, after becoming of

¹⁵⁷ *WATSON v. TURNER*, Bull. N. P. 147; *ATKINS v. BANWELL*, 2 East, 505; *Wing v. Mill*, 1 Barn. & Ald. 105.

¹⁵⁸ Ante, p. 108; *MILLS v. WYMAN*, 3 Pick. (Mass.) 207.

¹⁵⁹ *Paynter v. Williams*, 1 Crompt. & M. 810.

¹⁶⁰ *Anson*, Cont. (8th Ed.) 100-102.

¹⁶¹ *GLEASON v. DYKE*, 22 Pick. 390. And see *Doty v. Wilson*, 14 Johns. (N. Y.) 382.

¹⁶² Parke, B., in *Earle v. Oliver*, 2 Exch. 71; *SHEPARD v. RHODES*, 7 R. I. 470, 84 Am. Dec. 569; *Turlington v. Slaughter*, 54 Ala. 195; *Lonsdale v. Brown*, 4 Wash. C. C. 86, Fed. Cas. No. 8,493. Promise by the owner of a building to pay for materials furnished by a contractor who has failed to comply with the mechanic's lien law. *Morse v. Crate*, 43 Ill. App. 513.

¹⁶³ *TRUEMAN v. FENTON*, Cowp. 544; *DUSENBERRY v. HOYT*, 53 N. Y. 521, 13 Am. Rep. 513; *WAY v. SPERRY*, 6 Cush. (Mass.) 238, 52 Am. Dec.

age, to pay debts contracted during infancy, and which could not be enforced, is binding on him.¹⁶⁴ Some courts have held that a promise by a woman during widowhood or after divorce, to fulfill promises made during coverture, is binding;¹⁶⁶ but most courts hold that as a married woman's contract, unlike an infant's, is void, and not merely voidable, her new promise after the death of her husband, or after a divorce has been obtained, is without consideration.¹⁶⁸ So, also, a debt barred by the statute of limitations may be revived by a new promise to pay it, and the new promise may be implied from a mere acknowledgment of the debt.¹⁶⁷ And an indorser on a note, who has been discharged from liability from want of notice of nonpayment, may waive his discharge.¹⁶⁸ It has even been held, where bills, void for usury,

779; *SHIPPEY v. HENDERSON*, 14 Johns. (N. Y.) 178, 7 Am. Dec. 458; *Yates' Adm'rs v. Hollingsworth*, 5 Har. & J. (Md.) 216; *Katz v. Moessinger*, 110 Ill. 372; *Shaw v. Burney*, 86 N. C. 331, 41 Am. Rep. 461; *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. 837; *Wolffe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Carey v. Hess*, 112 Ind. 398, 14 N. E. 235; *Knapp v. Hoyt*, 57 Iowa, 591, 10 N. W. 925, 42 Am. Rep. 59; *Griell v. Solomon*, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; *Hobough v. Murphy*, 114 Pa. 358, 7 Atl. 139; *Murphy v. Crawford*, 114 Pa. 496, 7 Atl. 142, *Craig v. Seitz*, 63 Mich. 727, 30 N. W. 347; *Succession of Audrieu*, 44 La. Ann. 103, 10 South. 388; *Christie v. Bridgman*, 51 N. J. Eq. 331, 25 Atl. 939; *Higgins v. Dale*, 28 Minn. 126, 9 N. W. 583. But not if debt is voluntarily released. *Stafford v. Bacon*, 1 Hill (N. Y.) 532, 37 Am. Dec. 366. See ante, p. 137. Promise by third person to pay discharged debt. *Webster v. Le Compte*, 74 Md. 249, 22 Atl. 232.

¹⁶⁴ *Williams v. Moor*, 11 Mees. & W. 263; *Tibbetts v. Gerrish*, 25 N. H. 41, 57 Am. Dec. 307; *Bliss v. Perryman*, 1 Seam. (Ill.) 484; *Reed v. Batchelder*, 1 Metc. (Mass.) 559, *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Heady v. Borden*, 4 Ind. App. 475, 30 N. E. 1119; *EDMOND'S CASE* (1586) 3 Leon. 164.

¹⁶⁵ *LEE v. MUGGERIDGE*, 5 Taunt. 36 (this was on the ground of moral obligation); *Brown v. Bennett*, 75 Pa. 420; *Sharpless' Appeal*, 140 Pa. 63, 21 Atl. 239; *GOULDING v. DAVIDSON*, 26 N. Y. 604.

¹⁶⁶ *HAYWARD v. BARKER*, 52 Vt. 429, 36 Am. Rep. 762; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329; *MEYER v. HOWARTH*, 8 Adol. & El. 467; *Waters v. Bean*, 15 Ga. 358; *Putnam v. Tennyson*, 50 Ind. 456; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *KENT v. RAND*, 64 N. H. 45, 5 Atl. 760; *Valentine v. Bell*, 66 Vt. 280, 29 Atl. 251; *Wilcox v. Arnold*, 116 N. C. 708, 21 S. E. 434; *Thompson v. Hudgins*, 116 Ala. 93, 22 South. 632; *Holloway's Assignee v. Rudy* (Ky.) 60 S. W. 650. A promise by a married woman, having a separate estate, to pay for necessities furnished her on the credit of such estate, is a sufficient consideration for a new promise after the death of her husband. *Sherwin v. Sanders*, 59 Vt. 499, 9 Atl. 239, 59 Am. Rep. 750.

¹⁶⁷ *ILSLEY v. JEWETT*, 3 Metc. (Mass.) 439; *Keener v. Crull*, 19 Ill. 189; *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440; *Little v. Blunt*, 9 Pick. (Mass.) 488; *Pittman v. Elder*, 76 Ga. 371; *Pierce v. Wimberly*, 78 Tex. 187, 14 S. W. 454; *Hall v. Bryan*, 50 Md. 194; *Perkins v. Cheney*, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495. But a deceased person's debt which is barred will not support his widow's promise to pay it. *SULLIVAN v. SULLIVAN*, 99 Cal. 187, 33 Pac. 862.

¹⁶⁸ *Ross v. Hurd*, 71 N. Y. 14, 27 Am. Rep. 1; *Glidden v. Chamberlin*, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479.

were renewed after the usury laws had been repealed, the consideration for the renewal being the past loan, that the new bills were valid.¹⁶⁹

There is undoubtedly in all of these cases a moral obligation to fulfill the unenforceable promise, and many of the decisions, both old and modern, base the validity of the new promise on the ground of the moral obligation, thereby making this class of cases an exception to the rule that a moral obligation cannot support a promise.¹⁷⁰ If the effect of these cases is to make such an exception, it is unfortunate, to say the least, for there is much dicta to the effect that a moral obligation can never support a promise.¹⁷¹ It would seem much better to base the validity of such promises, not on the moral obligation, but on the prior agreement, supported by a valuable consideration, and the right of the promisor to waive the technical rules of law, meant for his benefit, and which render it unenforceable.

¹⁶⁹ *FLIGHT v. REED*, 1 Hurl. & C. 703; *Hammond v. Hopping*, 13 Wend. (N. Y.) 505. See *BARNES v. HEDLEY*, 2 Taunt. 184. But see *Ludlow v. Hardy*, 38 Mich. 690; ante, p. 109; and dissenting opinion of Martin, B., in *FLIGHT v. REED*, *supra*.

¹⁷⁰ *EDMOND'S CASE* (1586) 3 Leon. 164; *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. 837; *Turlington v. Slaughter*, 54 Ala. 195; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Carey v. Hess*, 112 Ind. 398, 14 N. E. 235; *Hobough v. Murphy*, 114 Pa. 358, 7 Atl. 139; *Murphy v. Crawford*, 114 Pa. 496, 7 Atl. 142; *Craig v. Seitz*, 63 Mich. 727, 30 N. W. 347; *Succession of Audrieu*, 44 La. Ann. 108, 10 South. 388. See post, p. 300.

¹⁷¹ *MILLS v. WYMAN*, 3 Pick. (Mass.) 207. And see ante, p. 108 et seq., and cases cited.

CHAPTER VI.

CAPACITY OF PARTIES.

- 81. In General.
- 82-83. Political Status—States and United States.
- 84. Foreign States and Sovereigns.
- 85-88. Aliens.
- 89. Convicts.
- 90. Professional Status.
- 91-94. Infants—In General.
- 95-97. Liability for Necessaries.
- 98. Ratification and Avoidance.
- 99-101. Who may Avoid Contract.
- 102-104. Time of Avoidance.
- 105-107. What Amounts to Ratification.
- 108. What Amounts to Disaffirmance.
- 109. Extent of Ratification or Disaffirmance.
- 110-111. Return of Consideration.
- 112-114. Effect of Ratification and Disaffirmance.
- 115-116. Torts in Connection with Contracts.
- 117. Insane Persons—In General.
- 118-121. Ratification and Avoidance.
- 122-123. Drunken Persons.
- 124. Married Women.
- 125-128. Corporations.

Thus far we have been dealing with the contract itself, and those elements in its formation which are essential to give it even a prima facie validity. Communication by offer and acceptance, and form or consideration, or, in some cases, both form and consideration, are necessary to every agreement that is to be considered by courts of law; but this is not all. When we have constructed an apparently binding contract, it is necessary, before we can pronounce finally upon its validity, to look to the parties to it, and ask who made it, under what circumstances, and with what object. In other words, we have to inquire whether the parties were capable of contracting, whether their apparent consent was genuine, and whether their object was legal.¹ In this chapter we shall consider the question of the capacity of the parties.

IN GENERAL.

81. Incapacity to contract may arise from the following causes:

- (a) **Political status.** In this connection we will consider contracts by
 - (1) **The United States or state governments;**
 - (2) **Foreign sovereigns or states, and their representatives;**
 - (3) **Aliens;**
 - (4) **Convicts.**

¹ See Anson, *Cont.* (4th Ed.) 102.

- (b) Professional status, as in the case of professional contracts by
 - (1) Attorneys;
 - (2) Physicians; and
 - (3) In some jurisdictions, other professional persons.
- (c) Youth, as in the case of infants.
- (d) Permanent or temporary mental aberration, as in the case of
 - (1) Idiocy;
 - (2) Insanity;
 - (3) Drunkenness.
- (e) Merger of capacity, as in case of married women.
- (f) Artificiality of construction, as in the case of corporations.

POLITICAL STATUS—STATES AND UNITED STATES.

- 82. The United States and the states may enter into contracts through their authorized agents, but only in furtherance of the objects of government, and subject to the limitations of the constitution.
- 33. They may sue on their contracts, but cannot be sued unless they submit thereto. This, however, they have very generally done by statutory or constitutional provisions.

The power of the United States government and the government of a state to enter into contracts in furtherance of objects for which the government was established, and not prohibited by constitutional limitations, is an incident to the general right of sovereignty. The question arose in the supreme court of the United States in a case in which it was held that a voluntary bond, taken by authority of the proper officers of the treasury department intrusted with the disbursement of public moneys to secure the fidelity in official duties of a receiver or disbursing agent, was a binding contract between him and his sureties and the United States, though the bond was not prescribed by any positive law. "Upon full consideration of this subject," said the court, "we are of opinion that the United States have such capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and, the United States being a body politic, may, within the sphere of the political powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the proper exercise of those powers. * * * To adopt a different principle would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments within the proper sphere of their own powers, unless brought into operation by express legislation. A doctrine to such an extent is not known to this court as ever having been sanctioned

by any judicial tribunal.”² The same doctrine applies to contracts by the state government.³

A contract, however, to bind the government, must be made by its authorized agent, and parties dealing with its agent must see at their peril that the agent has actual authority.⁴

Where the government enters into a contract, whether a negotiable instrument or otherwise, which it has authority to make, it is bound in any court to whose jurisdiction it submits by the same principles that govern individuals in their relation to such contracts.⁵

At common law the sovereign cannot be sued without his consent, and this doctrine prevents suits against a state or against the United States, in the absence of permission by virtue of some statutory or constitutional provision.⁶ There are, however, in most of the states, provisions allowing suit in some form by individuals against the state;⁷ and the United States may be proceeded against in the court of claims,⁸ and in some cases in the other federal courts.⁹ A state or the United States has the same right as an individual to maintain an action on a contract made with it,¹⁰ and it is the proper party to maintain such an action.

² *U. S. v. Tingey*, 5 Pet. 115, 8 L. Ed. 66. And see *U. S. v. Lane*, 3 McLean, 365, Fed. Cas. No. 15,559.

³ *Danolds v. State*, 89 N. Y. 37, 42 Am. Rep. 277.

⁴ *The Floyd Acceptances*, 7 Wall. 666, 3 L. Ed. 64; *Whiteside v. United States*, 93 U. S. 247, 23 L. Ed. 882. See *Tiffany*, Ag. 201.

⁵ *The Floyd Acceptances*, supra; *Danolds v. State*, supra; *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *U. S. v. Ingate* (C. C.) 48 Fed. 251.

⁶ *U. S. v. Clarke*, 8 Pet. 436, 8 L. Ed. 1001; *Troy & G. R. Co. v. Com.*, 127 Mass. 43; *Ottawa Co. v. Aplin*, 69 Mich. 1, 36 N. W. 702; *President, etc., of Michigan State Bank v. Hammond*, 1 Doug. (Mich.) 527; *Same v. Hastings*, 1 Doug. (Mich.) 225, 41 Am. Dec. 549; *Pattison v. Shaw*, 6 Ind. 377; *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141; *People v. Talmage*, 6 Cal. 257; *Taylor v. Hall*, 71 Tex. 206, 9 S. W. 148; *Galbes v. Girard* (C. C.) 46 Fed. 500; *Ferris v. Land Co.*, 94 Ala. 557, 10 South. 607, 33 Am. St. Rep. 146. An action against a state or United States officer, which is in effect against the state or the United States, is within the rule. *Ottawa Co. v. Aplin*, 69 Mich. 1, 36 N. W. 702; *Taylor v. Hall*, 71 Tex. 206, 9 S. W. 148; *Aplin v. Board*, 73 Mich. 182, 41 N. W. 223; *Mills Pub. Co. v. Larrabee*, 78 Iowa, 97, 42 N. W. 593; *State v. Temple*, 134 U. S. 22, 10 Sup. Ct. 509, 33 L. Ed. 849; *Brown University v. Rhode Island College* (C. C.) 56 Fed. 55.

⁷ *Wesson v. Com.*, 144 Mass. 60, 10 N. E. 762; *Green v. State*, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610; *Hoagland v. State* (Cal.) 22 Pac. 142; *Board of Education of Granville Co. v. State Board*, 106 N. C. 81, 10 S. E. 1002.

⁸ *Nicholl v. U. S.*, 7 Wall. 122, 19 L. Ed. 125; *Finn v. U. S.*, 123 U. S. 227, 8 Sup. Ct. 82, 31 L. Ed. 128; *United States v. Cumming*, 130 U. S. 152, 9 Sup. Ct. 583, 32 L. Ed. 1029.

⁹ *Torrey v. U. S.* (C. C.) 42 Fed. 207; *Bowe v. U. S.*, Id. 761.

¹⁰ *State v. Grant*, 10 Minn. 39 (Gil. 22); *State v. Burkeholder*, 30 W. Va. 593, 5 S. E. 439; *People v. City of St. Louis*, 5 Gilman (Ill.) 351, 48 Am. Dec.

SAME—FOREIGN STATES AND SOVEREIGNS.

- 84. Foreign sovereigns and states and their representatives may make contracts and sue thereon in our courts, but they cannot be sued unless they submit.**

Foreign states and sovereigns and their representatives, and the officials and household of their representatives, are not subject to the jurisdiction of our courts unless they submit to it.¹¹ A contract, therefore, entered into with such persons, cannot be enforced against them unless they so choose, but it may be enforced by them.¹²

SAME—ALIENS.

- 85. An alien, not an alien enemy, has in most jurisdictions the same power to contract that a subject has, and may in like manner sue and be sued on his contracts. In some jurisdictions he cannot acquire or hold land.**
- 86. ALIEN ENEMIES—An alien enemy cannot, as a rule, without leave of the government, make any contract with a subject, or enforce any existing contract, during the continuance of hostilities.**
- 87. He may be sued on existing contracts, and in such a case he may defend.**
- 88. Pre-existing contracts are not dissolved by the war unless they are of a continuing nature.**

An alien is said to be a person born out of the jurisdiction of the United States, subject to some foreign government, who has not been naturalized under their constitution and laws,¹³ but under our statutes this is not strictly true. It is not within the scope of this work to go fully into this question. The statutes and decisions must be consulted.¹⁴ The right of aliens to take, hold, and dispose of property, real

339; *Spencer v. Brockway*, 1 Ohio, 259, 13 Am. Dec. 615; *United States v. Holmes* (C. C.) 105 Fed. 41.

¹¹ *Taylor v. Best*, 14 C. B. 487.

¹² *See King of Prussia v. Kuepper's Adm'r*, 22 Mo. 550, 66 Am. Dec. 639; *Bish. Cont.* § 998.

¹³ 2 Kent, Comm. 50; *Dawson v. Godfrey*, 4 Cranch, 321, 2 L. Ed. 634; *Ainslie v. Martin*, 9 Mass. 456; 1 Am. & Eng. Enc. Law, 457, note 1.

¹⁴ As to who are aliens, see *State v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602; *Boyd v. Nebraska*, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103; *State v. Andriano*, 92 Mo. 70, 4 S. W. 263; *Charles Green's Son v. Salas* (C. C.) 31 Fed. 106; *Ware v. Wisner* (C. C.) 50 Fed. 310; *City of Minneapolis v. Reum*, 6 C. C. A. 31, 56 Fed. 576; *Comitis v. Parkerson*, 56 Fed. 556, 22 L. R. A. 148; minor children of naturalized foreigners, *State v. Andriano*, 92

or personal, is generally regulated by the states. In some states the constitution expressly prohibits the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens with respect to the acquisition, possession, enjoyment, and transmission of property.¹⁵ In some states, where there is no such constitutional provision, aliens are prohibited from acquiring and holding real property, while in others nonresidents are not given such right, while residents are; but in many states aliens, whether resident or not, have the same rights in this respect as native-born subjects.¹⁶ In most, if not in all, the states they have the power to make and enforce contracts in respect to personal property, and such contracts may be enforced against them.¹⁷ The rule does not apply to alien enemies.

*Alien Enemies.*¹⁸

An alien enemy is one who is the subject or citizen of some hostile state or power. War suspends all commercial intercourse between the belligerent countries, except so far as may be allowed by the sovereign authority, and all contracts which tend to increase the resources of the enemy or involve commercial dealing between the two countries are prohibited.¹⁹ Nor can an alien enemy enforce any existing contract²⁰ during the continuance of hostilities. These rules were applied to con-

Mo. 70, 4 S. W. 263; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704; *State v. Boyd*, 31 Neb. 682, 48 N. W. 739, 51 N. W. 602. Alien woman marrying a citizen becomes a citizen. *Ware v. Wisner* (C. C.) 50 Fed. 310. Minor children of foreign parents, whose mother, after the death of the father, marries a citizen, become citizens. *Kreitz v. Behrensmeyer*, 125 Ill. 141, 17 N. E. 232. Children born abroad of American citizens are citizens. *Ware v. Wisner* (C. C.) 50 Fed. 310.

¹⁵ See *State v. Smith*, 70 Cal. 153, 12 Pac. 121; *Nicrosi v. Phillipi*, 91 Ala. 299, 8 South. 561.

¹⁶ See *Milliken v. Barrow* (C. C.) 55 Fed. 148; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532; *McCreery v. Allender*, 4 Har. & McH. (Md.) 409; *Zundel v. Gess*, 73 Tex. 144, 9 S. W. 879; *Wunderle v. Wunderle*, 144 Ill. 40, 32 N. E. 195, 19 L. R. A. 84; *Furenes v. Mickleleson*, 86 Iowa, 508, 53 N. W. 416; *Bennett v. Hibbert*, 88 Iowa, 154, 55 N. W. 93.

¹⁷ *Taylor v. Carpenter*, 3 Story, 458, Fed. Cas. No. 13,784; *Franco-Texan Land Co. v. Chaptive* (Tex. Sup.) 3 S. W. 31.

¹⁸ Post, p. 290.

¹⁹ *Kershaw v. Kelsey*, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; *UNITED STATES v. GROSSMAYER*, 9 Wall. 72, 19 L. Ed. 627; *New York Life Ins. Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453; *Williams v. Paine*, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658; *O'Mealey v. Wilson*, 1 Camp. 482; *Phillips v. Hatch*, 1 Dill. 571, Fed. Cas. No. 11,094; *Hill v. Baker*, 32 Iowa, 302, 7 Am. Rep. 193; *Masterson v. Howard*, 18 Wall. 99, 19 L. Ed. 953; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444, 18 Am. Rep. 741; *Wright v. Graham*, 4 W. Va. 430; *Habricht v. Alexander*, 1 Woods, 413, Fed. Cas. No. 5,886; *De Jarnette v. De Giverville*, 56 Mo. 440.

²⁰ *Brooke v. Filer*, 35 Ind. 402; *Blackwell v. Willard*, 65 N. C. 555, 6 Am. Rep. 749; *Semmes v. Insurance Co.*, 36 Conn. 543, Fed. Cas. No. 12,651.

tracts between the respective citizens of the Northern and Southern states during the Civil War.²¹ Though an alien enemy cannot sue on contracts during the continuance of hostilities, he may be sued, and in such case he may defend.²²

Same—Pre-existing Contracts.

Whether a pre-existing contract is dissolved or not by the war depends upon whether it is essentially antagonistic to the laws governing a state of war. If it is of a continuing nature, as in the case of a partnership, or of an executory character merely, and in the performance of its essential features would violate such laws, it would be dissolved; but, if not, and rights have become vested under it, the contract will either be qualified, or its performance suspended, according to its nature, so as to strip it of its objectionable features, and save such rights. The tendency of adjudication is to preserve, and not to destroy, contracts existing before the war.²³

SAME—CONVICTS.

89. In this country a convict can in most jurisdictions, unless prohibited by statute, make contracts, and sue and be sued thereon.

At common law a person who has been convicted of treason or felony could not, during the continuance of his conviction, make a valid contract; nor could he enforce contracts made previous to conviction. With us this rule is not recognized to any extent, and a convict undergoing a sentence of imprisonment, or even awaiting execution of a sentence of death, may, in the absence of statutory restrictions, enter into contracts, and sue or be sued thereon.²⁴ In some states, however, there are statutes declaring that a sentence of imprisonment in the penitentiary shall suspend all civil rights, and in these states a contract by a convict while under sentence is void.²⁵ This, however, does not render him civilly dead, unless the statute so provides, as it does

²¹ See cases in preceding notes.

²² *Dorsey v. Thompson*, 37 Md. 25; *McVeigh v. U. S.*, 11 Wall. 259, 20 L. Ed. 80; *Mixer v. Sibley*, 53 Ill. 61; *McNair v. Toler*, 21 Minn. 175. See *Clarke v. Morey*, 10 Johns. (N. Y.) 69.

²³ *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444, 18 Am. Rep. 741; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; *Semmes v. City Fire Ins. Co.*, 36 Conn. 543, Fed. Cas. No. 12,651; *Bank of New Orleans v. Matthews*, 49 N. Y. 12; *Cohen v. Insurance Co.*, 50 N. Y. 610, 10 Am. Rep. 522; *Washington University v. Finch*, 18 Wall. 106, 21 L. Ed. 818; *Whelan v. Cook*, 29 Md. 1; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *Same v. Thompson*, 37 Md. 25.

²⁴ *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118; *Willingham v. King*, 23 Fla. 478, 2 South. 851; *In re Estate of Nerac*, 35 Cal. 392, 95 Am. Dec. 111. And see *Dade Coal Co. v. Haslett*, 83 Ga. 549, 10 S. E. 435.

²⁵ *Williams v. Shackelford*, 97 Mo. 322, 11 S. W. 222.

generally where the sentence is for life; nor prevent his creditor from suing him, for, though his civil rights are suspended, the rights of creditors are not suspended.²⁶

PROFESSIONAL STATUS.

90. In England a barrister cannot sue upon a contract for compensation for his services, but this disability does not exist in the United States.

In England, a barrister cannot sue for fees due him for services rendered in the ordinary course of his professional duties, either upon an implied or an express contract. Formerly a physician was so far in the same position as a barrister that, until the law was changed by statute, the rendition of services on request raised no implied promise to pay for them, though the patient might bind himself by express contract. But these disabilities are not to any extent recognized in this country.²⁷ There are, indeed, in most, if not all, the states, statutes prescribing certain requisites to entitle a physician, attorney, and certain other professional men to practice, such as the taking out of a license; and, until he has complied with the statute, he has no right to practice, and contracts made with him for professional services are void. This, however, is properly for treatment later.²⁸

INFANTS--IN GENERAL.

91. Some contracts of an infant are valid, and a few, in some jurisdictions, are absolutely void, but most of his contracts are simply voidable at his option.

92. VALID CONTRACTS—The valid contracts of an infant are:

- (a) Contracts created by law, or quasi contracts.
- (b) Contracts entered into under authority or direction of law.
- (c) Contracts made in order to do what he was legally bound to do, and could have been compelled to do.

93. VOID CONTRACTS—In some jurisdictions a contract of an infant which is manifestly and without doubt to his prejudice is void.

94. VOIDABLE CONTRACTS—The tendency is to hold all contracts other than valid ones simply voidable at the infant's option.

²⁶ In re Estate of Nerac, 35 Cal. 392, 95 Am. Dec. 111.

²⁷ Vilas v. Downer, 21 Vt. 419; Garrey v. Stadler, 67 Wis. 248, 30 N. W. 787, 58 Am. Rep. 877; Price v. Hay, 132 Ill. 543, 24 N. E. 620; Boyd v. Lee, 36 S. C. 19, 15 S. E. 332. In New Jersey, counsel fees, as such, cannot be recovered in the absence of an express agreement. Van Atta v. McKinney's Ex'rs, 16 N. J. Law, 235; Blake v. City of Elizabeth, 2 N. J. Law J. 328; Hopper v. Ludlum, 41 N. J. Law, 182. It is otherwise where there is an express agreement to pay for them. Zabriskie v. Woodruff, 48 N. J. Law, 610, 7 Atl. 336.

²⁸ See post, p. 263.

In General.

An infant, at common law, is a person under twenty-one years of age, whether male or female; but in some jurisdictions, by statute, females attain their majority at eighteen, either for all purposes or for particular purposes specified in the statute. Since the common law, as a rule, does not regard fractions of a day, an infant becomes of age on the beginning of the day before his or her twenty-first or eighteenth birthday, as the case may be.²⁹

As we shall see, the contracts of an infant, as a rule, are not void, but simply voidable at his option. The rule is intended for the infant's benefit; and it may therefore be said that infancy in effect confers a privilege, rather than imposes a disability.

Emancipation of an infant by his parent gives him the right to his earnings, and releases him from his parent's control, but it does not remove his disability, and clothe him with the power to contract.³⁰

The Old Doctrine as to the Effect of an Infant's Contract.

There is much confusion and conflict in the authorities as to the effect of the contracts of infants. In an early English case the doctrine was stated to be that (1) where the court could pronounce the contract for the benefit of the infant, as for necessities, it was good; (2) that where the court could pronounce it to be to his prejudice it was void; and (3) that in those cases where the benefit or prejudice were uncertain the contract was voidable only.³¹ And the same doctrine has been laid down by some of the American courts and text writers.³²

This cannot, however, be accepted as a correct statement of the law to-day. In the first place, many contracts are binding on an infant without regard to whether they are for his benefit or not. In the second place, the great weight of authority is against making any distinction between contracts of an infant as being void or voidable, and in favor of holding all contracts other than valid ones, with a very few exceptions, simply voidable by the infant at his option.³³ The object of the law is merely to protect the infant, and this object is amply

²⁹ Metc. Cont. (Heard's Ed.) 43; *Herbert v. Turball*, 1 Keble, 589, Ewell's Cas. 1; *Bardwell v. Purrington*, 107 Mass. 419; *State v. Clarke*, 3 Har. (Del.) 557; *Hamlin v. Stevenson*, 4 Dana (Ky.) 597; *Wells v. Wells*, 6 Ind. 447; *Lenhart v. State*, 33 Tex. Cr. R. 504, 27 S. W. 260.

³⁰ *Mason v. Wright*, 13 Metc. (Mass.) 306; *Tyler v. Fleming*, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; *Genereux v. Sibley*, 18 R. I. 43, 25 Atl. 345.

³¹ *Keane v. Boycott*, 2 H. Bl. 511.

³² *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Tucker v. Moreland*, 10 Pet. 65, 9 L. Ed. 345; *Owen v. Long*, 112 Mass. 403; *Dunton v. Brown*, 31 Mich. 182; *Green v. Wilding*, 59 Iowa, 679, 13 N. W. 761, 44 Am. Rep. 696; *Robinson v. Weeks*, 56 Me. 102.

³³ *Henry v. Root*, 33 N. Y. 526; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Homes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Lemmon v. Beeman*, 45 Ohio St. 505, 15

secured by not allowing the contract to be enforced against him during his infancy, and allowing him to repudiate it on attaining his majority. Moreover, such a distinction must necessarily be arbitrary and doubtful, for it must always be difficult, if not impossible, to say whether a particular contract may not possibly be beneficial. It is better to allow the infant to decide this question for himself when he becomes of age.³⁴

Valid Contracts—Quasi Contracts.

Quasi contracts, or so called contracts created by law because of a legal duty on the part of the person bound, are as binding on an infant as on an adult.³⁵ The common law creates, as an incident to marriage, a duty on the part of the husband to pay the antenuptial debts of the wife, and this liability is imposed on infant as well as adult husbands.³⁶ The liability of an infant for necessities furnished him is quasi contractual.³⁷

Same—Contracts Authorized by Law.

The rule that contracts of infants are voidable does not apply to contracts entered into by them under authority or direction of a statute or of the common law. For instance, a voluntary assignment of his property by an infant debtor imprisoned for debt, made under a statute allowing "every person" to make such an assignment, has been held valid and binding on him, notwithstanding his infancy.³⁸ So, also, where an infant executed a bond for the support of his bastard child, in pursuance of a statute, it was held that the statute applied to infants, and that the bond was valid;³⁹ and a contract of enlistment in the army by an infant has been held valid.⁴⁰

N. E. 476; Kendrick v. Niesz, 17 Colo. 506, 30 Pac. 245; Owen v. Long, 112 Mass. 403; Fetrow v. Wiseman, 40 Ind. 148; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Cole v. Pennoyer, 14 Ill. 158; Patchin v. Cromach, 13 Vt. 330; Bozeman v. Browning, 31 Ark. 364; Weaver v. Jones, 24 Ala. 420; Ridgeley v. Crandall, 4 Md. 435; McDonald v. Sargent, 171 Mass. 492, 51 N. E. 17; Union Cent. Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. 230, 53 L. R. A. 462, 81 Am. St. Rep. 644.

³⁴ Pol. Cont. 52; 1 Pars. Cont. 244.

³⁵ Bish. Cont. § 906.

³⁶ Roach v. Quick, 9 Wend. (N. Y.) 238; Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258; Butler v. Breck, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; Mitchinson v. Hewson, 7 Term R. 348; Nicholson v. Wilborn, 13 Ga. 467; Anderson v. Smith, 33 Md. 465.

³⁷ Post, p. 547.

³⁸ People v. Mullin, 25 Wend. (N. Y.) 698.

³⁹ People v. Moores, 4 Denio (N. Y.) 518, 47 Am. Dec. 272; and see McCall v. Parker, 13 Metc. (Mass.) 372, 46 Am. Dec. 735; Bordentown Tp. v. Wallace, 50 N. J. Law, 13, 11 Atl. 267; Gavin v. Burton, 8 Ind. 69; Stowers v. Hollis, 83 Ky. 544. An infant's recognition for appearance at court is binding. State v. Weatherwax, 12 Kan. 463; Dial v. Wood, 9 Baxt. (Tenn.) 296.

⁴⁰ U. S. v. Bainbridge, 1 Mason, 71, Fed. Cas. No. 14,497; Com. v. Murray.

It should be mentioned that in some jurisdictions the court is authorized by statute to remove the disabilities of infants in particular cases.⁴¹

Same—Contract in Performance of Legal Obligation.

Nor does the rule apply where, by his contract, an infant has only done that which he was bound by law to do, and could have been compelled to do. In such a case the contract is valid, and he cannot avoid it.⁴² Under this rule, a conveyance of land by an infant, which he could have been compelled in equity to make, is binding on him. Where, for instance, a father purchased land, and took the title in the name of his son, and the son afterwards during his minority conveyed it to a purchaser from his father, the conveyance was held to be binding on the ground that he merely parted with the naked title, and only did that which a court of equity would have compelled him to do.⁴³ In the leading case on this point an infant mortgagee had, on payment of the mortgage debt to the persons entitled to receive it, made a reconveyance of the land, and the court held that, as this was an act which by law he could have been compelled to perform, his voluntary performance of it was binding, notwithstanding his infancy.⁴⁴

It is said in a New York case: "When an infant is under a legal obligation to do an act, he may bind himself by a fair and reasonable contract made for the purpose of discharging the obligation. If this be not a general rule, it is at least one of pretty wide application."⁴⁵

Same—Executed Contract.

In some jurisdictions it is held that, if the contract is so far executed that the infant has received the consideration, he cannot repudiate the

4 Bin. (Pa.) 487, 5 Am. Dec. 412; U. S. v. Blakeney, 3 Grat. (Va.) 405; In re Higgins, 16 Wis. 351; In re Hearn (D. C.) 32 Fed. 141. At common law an enlistment was not voidable by the infant or his parent. *Morrissey v. Perry*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644.

⁴¹ See *Doles v. Hilton*, 48 Ark. 305, 3 S. W. 193; *Brown v. Wheelock*, 75 Tex. 385, 12 S. W. 111; *McKamy v. Cooper*, 81 Ga. 679, 8 S. E. 312; *Emancipation of Pochelu*, 41 La. Ann. 331, 6 South. 541; *Succession of Gaines*, 42 La. Ann. 699, 7 South. 788.

⁴² *Co. Litt.* 172a; 2 Kent, Comm. 242; *Tucker v. Moreland*, 10 Pet. 58, 9 L. Ed. 345; *Prouty v. Edgar*, 6 Iowa, 353; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; *Trader v. Jarvis*, 23 W. Va. 100; *Nordholt v. Nordholt*, 87 Cal. 552, 26 Pac. 599, 22 Am. St. Rep. 268; *Starr v. Wright*, 20 Ohio St. 97. A voluntary equal partition by an infant, since he could be compelled to make it, is valid. *Bavington v. Clarke*, 2 Pen. & W. (Pa.) 115, 21 Am. Dec. 432; *Cocks v. Simmons*, 57 Miss. 183. So, also, a contract by a minor with the mother of his bastard child to support it is binding. *Stowers v. Hollis*, 83 Ky. 544; *Gavin v. Burton*, 8 Ind. 69. And see note —, *supra*. So a note given by an infant in settlement of his liability for a tort. *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519.

⁴³ *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488.

⁴⁴ *Zouch v. Parsons*, 3 Burrows, 1801.

⁴⁵ *People v. Moores*, 4 Denio (N. Y.) 518, 47 Am. Dec. 272.

contract, and recover what he has paid, or for what he has done, unless he can and does place the other party in statu quo. This doctrine, as we shall see, is not generally accepted in cases where the consideration cannot be returned.⁴⁶

Void Contracts.

As already stated, some courts still hold that contracts manifestly and without doubt prejudicial to the infant are void.⁴⁷ Among the contracts which have been held void upon this ground may be mentioned conveyances of land without consideration,⁴⁸ contracts of suretyship,⁴⁹ and obligations with a penalty.⁵⁰ This, however, is no longer the prevailing doctrine.

Voidable Contracts.

Under the prevailing doctrine that the contracts of an infant are voidable, and not void, contrary to the decisions mentioned in the preceding paragraph, some courts have held contracts of suretyship,⁵¹ and bonds with a penalty,⁵² merely voidable. Probably all courts regard as merely voidable purchases or sales and conveyances of real or personal property, including mortgages, for a consideration,⁵³ partnership agreements,⁵⁴ agreements to render services,⁵⁵ promissory notes,⁵⁶ indorsement of a promissory note,⁵⁷ and the like.⁵⁸

⁴⁶ Post, p. 171.

⁴⁷ Ante, p. 150. For a collection of cases on the question when a contract by an infant is to be held void and when merely voidable, see Ewell, Lead. Cas. 30-34, 44-46, 52-55.

⁴⁸ Robinson v. Coulter, 90 Tenn. 705, 18 S. W. 250, 25 Am. St. Rep. 708.

⁴⁹ Maples v. Wightman, 4 Conn. 376, 10 Am. Dec. 149.

⁵⁰ Fisher v. Mowbray, 8 East, 330; Baylis v. Dinely, 3 Maule & S. 477.

⁵¹ Owen v. Long, 112 Mass. 403; Fetrow v. Wiseman, 40 Ind. 148; Williams v. Harrison, 11 S. C. 412; Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496.

⁵² Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Weaver v. Jones, 24 Ala. 420; Reed v. Lane, 61 Vt. 481, 17 Atl. 796.

⁵³ Cole v. Pennoyer, 14 Ill. 158; Irvine v. Irvine, 9 Wall. 617, 19 L. Ed. 800; Zouch v. Parsons, 3 Burrows, 1794; Bigelow v. Kinney, 3 Vt. 353, 21 Am. Dec. 589; Dixon v. Merritt, 21 Minn. 196; Hastings v. Dollarhide, 24 Cal. 195; Logan v. Gardner, 136 Pa. 588, 20 Atl. 625, 20 Am. St. Rep. 939; French v. McAndrew, 61 Miss. 187; Henry v. Root, 33 N. Y. 526; Callis v. Day, 38 Wis. 643; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 732.

⁵⁴ Dunton v. Brown, 31 Mich. 182.

⁵⁵ Vent v. Osgood, 19 Pick. (Mass.) 572; Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777; Harney v. Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662. And see post, p. 175.

⁵⁶ Goodsell v. Myers, 3 Wend. (N. Y.) 479; Fetrow v. Wiseman, 40 Ind. 148; Wamsley v. Lindenberger, 2 Rand. (Va.) 478; Earle v. Reed, 10 Metc. (Mass.) 889; Minock v. Shortridge, 21 Mich. 314.

⁵⁷ Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101; Willis v. Twambly, 13 Mass. 204; Frazier v. Massey, 14 Ind. 382; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503.

⁵⁸ Lease by or to infant. Zouch v. Parsons, 3 Burrows, 1794; Griffith v.

Appointment of Agent.

It is very generally laid down, even by courts which do not recognize the old doctrine as to void and voidable contracts, that an infant cannot appoint an agent or attorney, and that such appointment, and consequently all acts and contracts of the agent thereunder, are void,⁵⁹ subject to an exception where the appointment is to do an act to the infant's advantage, as to receive seisin.⁶⁰ It is noticeable, however, that nearly all the cases which lay down this rule are cases involving warrants of attorney to confess judgment and powers of attorney to execute a deed; and while as to these the rule appears to be firmly established, the tendency of the later decisions is to confine the rule to such cases, and in other cases to hold an infant's appointment of an agent and the acts and contracts made under it as voidable, and not void.⁶¹

Schwenderman, 27 Mo. 412. Submission to arbitration. *Jones v. Bank*, 8 N. Y. 228; *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221. Settlement of disputed boundary. *Brown v. Caldwell*, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660. Compromise of action or claim. *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489; *Baker v. Lovett*, 6 Mass. 78. An infant's promise to marry is voidable at his or her option. *HOLT v. WARD CLARENCIEUX*, 2 Strange, 937, Ewell, Lead. Cas. 50; *Hunt v. Peake*, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; *Rush v. Wick*, 31 Ohio St. 521, 27 Am. Rep. 523; *Cannon v. Alsbury*, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659. And it has been held that a statute providing that persons under the age of 21 years "may contract and be joined in marriage" does not remove an infant's disability in this respect, so as to render him liable for breach of promise to marry. *McConkey v. Barnes*, 42 Ill. App. 511.

⁵⁹ *Saunderson v. Marr*, 1 H. Bl. 75; *Doe v. Roberts*, 16 M. & W. 778; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77; *Bool v. Mix*, 17 Wend. (N. Y.) 120, 31 Am. Dec. 285; *Bennett v. Davis*, 6 Cow. (N. Y.) 393; *Knox v. Flack*, 22 Pa. 337; *Waples v. Hastings*, 3 Har. (Del.) 403; *Wainwright v. Wilkinson*, 62 Md. 146; *Philpot v. Bingham*, 55 Ala. 439; *Pyle v. Cravens*, 4 Litt. (Ky.) 17; *Lawrence's Lessee v. McArter*, 10 Ohio, 37; *Armitage v. Widoe*, 36 Mich. 124; *TRUEBLOOD v. TRUEBLOOD*, 8 Ind. 195, 65 Am. Dec. 756; *Holden v. Curry*, 85 Wis. 504, 55 N. W. 965; *Wambole v. Foote*, 2 Dak. 1, 2 N. W. 239. See, also, *Bartholomew v. Dighton*, Cro. Eliz. 424; *Whittingham's Case*, 8 Co. 42b; *Dexter v. Hall*, 15 Wall. 9, 25, 21 L. Ed. 73; *Tucker v. Moreland*, 10 Pet. 58, 68, 9 L. Ed. 345; *Flexner v. Dickerson*, 72 Ala. 318; *Cole v. Pennoyer*, 14 Ill. 158; *Fetrow v. Wiseman*, 40 Ind. 148, 155; *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268.

⁶⁰ *Zouch v. Parsons*, 3 Burr. 1794, 1805, 1808. See *Duvall v. Graves*, 7 Bush. (Ky.) 461.

⁶¹ *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Welch v. Welch*, 103 Mass. 562; *Moley v. Brine*, 120 Mass. 324; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446, per Holmes, J.; *Hardy v. Waters*, 38 Me. 450; *Towle v. Dresser*, 73 Me. 252; *Patterson v. Lippincott*, 47 N. J. Law. 457, 1 Atl. 506, 54 Am. Rep. 178; *Hastings v. Dollarhide*, 24 Cal. 195; *Coursolle v. Weyerhaeuser*, 69 Minn. 328, 72 N. W. 697. See *Tiffany*, Ag. 94.

SAME—LIABILITY FOR NECESSARIES.

- 95. An infant is liable for the reasonable value of necessities furnished him.**
- 96. What are necessities will depend upon the particular circumstances. The term includes whatever is reasonably needed for his subsistence, health, comfort, or education, taking into consideration his age, state, and condition in life. The following rules may be stated:**
- (a) The things furnished must concern his person, and not his estate.
 - (b) He is not liable for money borrowed, and expended for necessities, unless the lender sees that it is so expended.
 - (c) An infant is liable for necessities furnished his wife, and, in some jurisdictions, children.
 - (d) Persons supplying an infant act at their peril, and cannot recover if the actual circumstances were such that the things furnished were not necessities.
- 97. The liability of an infant for necessities is not contractual, but quasi contractual, and his express contract for necessities is voidable; but in some jurisdictions a recovery to the extent of their reasonable value is allowed in an action upon the express contract.**

Among the contracts which are manifestly for the benefit of an infant, and hence binding, it is frequently said are his contracts for necessities. The obligation of an infant to pay for necessities furnished to him is, however, quasi contractual, rather than contractual. This is shown by the fact that it is generally held that he is liable to pay, not the price, but the reasonable value, of the necessities.⁶²

What are Necessaries.

Lord Coke has said that an infant's necessities are "his necessary meat, drinke, apparel, necessary physicke, and such other necessities, and likewise for his good teaching or instruction, whereby he may profit himself afterwards."⁶³ Under this rule necessities will include whatever is reasonably needed for the infant's subsistence, such as food and lodging;⁶⁴ for his health, such as medicine, and services of a physician or nurse in case of sickness;⁶⁵ for his comfort,⁶⁶ and for his

⁶² Post, p. 547.

⁶³ Co. Litt. 172a. For a good discussion of the law in regard to necessities, see *Ryder v. Wombwell*, L. R. 3 Exch. 95.

⁶⁴ *Barnes v. Barnes*, 50 Conn. 572; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274. Dinners supplied to a student at private rooms at a university, *prima facie* not necessities. *Brooker v. Scott*, 11 Mees. & W. 67; *Wharton v. McKenzie*, 5 Q. B. 606. Hotel bill. *Watson v. Cross*, 2 Duv. (Ky.) 147. Dwelling house not a necessity. *Allen v. Lardner*, 78 Hun, 603, 29 N. Y. Supp. 213.

⁶⁵ *Glover & Co. v. Ott's Adm'r*, 1 McCord (S. C.) 572; *Werner's Appeal*, 91 Pa. 222. And see *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371; *Wailing v.*

⁶⁶ See note 66 on following page.

education.⁶⁷ The term is not limited to what is necessary to the actual support of life, but extends "to articles fit to maintain the particular person in the state, station, and degree in life in which he is," so that things may be necessary for one person which would not be necessary for another in a different station in life.⁶⁸

The question must therefore depend on the circumstances of each particular case, though there are some things, of course, which are obviously incapable of being deemed necessities. A wild animal, or a steam roller, or a railroad engine, cannot, under any circumstances, be deemed such. Nor can things intended for ornament, and not for use,⁶⁹ or merely for pleasure,⁷⁰ be regarded as necessary. Again,

Toll, 9 Johns. (N. Y.) 141. A horse may be necessary for health, *Hart v. Prater*, 1 Jur. 623; *Harrison v. Fane*, 1 Man. & G. 550; but not if for pleasure, note 70, *infra*.

⁶⁸ *Dentist's services*. *Strong v. Foote*, 42 Conn. 203. An infant is liable for reasonable attorney's fees for defending him in a criminal prosecution. *Askey v. Williams*, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160. And see *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151; *Crafts v. Carr* (R. I.) 53 Atl. 275, 60 L. R. A. 128. Wedding outfit. *Jordan v. Coffield*, 70 N. C. 110; *Sams v. Stockton*, 14 B. Mon. (Ky.) 232. Clothing. *Mackerell v. Batchelor*, Cro. Eliz. 583; *Glover & Co. v. Ott's Adm'r*, 1 McCord (S. C.) 572. But not for an unnecessary supply of clothing. *Johnson v. Lines*, 6 Watts & S. 80, 40 Am. Dec. 542; *Burghart v. Angerstein*, 6 Car. & P. 690.

⁶⁷ Common-school education, but not generally a college education, though the latter may, under some circumstances, be a necessary. *Middlebury College v. Chandler*, 16 Vt. 686, 42 Am. Dec. 537; *Pickering v. Gunning*, W. Jones, 182. Board bill contracted by an infant to enable him to attend school is a necessary expense. *Kilgore v. Rich*, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780. Professional education not necessary. *Turner v. Gaffner*, 83 N. C. 357, 35 Am. Rep. 574; *Bouchell v. Clary*, 3 Brev. (S. C.) 194.

⁶⁸ *Peters v. Fleming*, 6 Mees. & W. 46; *Ewell*, Lead. Cas. 56; *Ryder v. Wombwell*, L. R. 4 Exch. 32; *McKanna v. Merry*, 61 Ill. 177; *Breed v. Judd*, 1 Gray (Mass.) 455; *Squier v. Hydliff*, 9 Mich. 274; *Wilhelm v. Hardman*, 13 Md. 144; *Jordan v. Coffield*, 70 N. C. 110; *Nicholson v. Spencer*, 11 Ga. 610. Board of four horses for six months, the principal use of which was in the business of an infant as a hackman, though the horses were occasionally used to carry his family out to drive, was held not necessary. *Merriam v. Cunningham*, 11 Cush. (Mass.) 40. Livery for the servant of an infant officer in the army was held a necessary. *Hand v. Slaney*, 8 Term R. 578. And see *Coates v. Wilson*, 5 Esp. 152. But not cockades ordered for his soldiers. *Hand v. Slaney*, *supra*. "Articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed." *Chapple v. Cooper*, 13 Mees. & W. 252.

⁶⁹ *Peters v. Fleming*, 6 Mees. & W. 42; *McKanna v. Merry*, 61 Ill. 179.

⁷⁰ *McKanna v. Merry*, 61 Ill. 179; *Saunders v. Ott's Adm'r*, 1 McCord (S. C.) 572; *Beeler v. Young*, 1 Bibb (Ky.) 519. Horse, carriage, or bicycle not ordinarily a necessity. *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *Beeler v. Young*, 1 Bibb (Ky.) 519; *How-*

things may be of a useful or necessary character, but the quality or quantity supplied may take them out of the character of necessities.⁷¹ Elementary text-books might be necessary to a law student; but not a rare edition, nor a great number of copies of a single book. Things necessary to a person in one station of life might not be necessary to a person in a different station. Again, things not usually necessary may become so from the circumstances of the infant. Medical attendance and expensive articles of food may ordinarily be dispensed with, but may become necessary in case of ill health.

Things with which an infant is already sufficiently supplied are not necessary.⁷² An infant residing under the care of his father or guardian, and supported by him, is not liable even for necessities; and it even seems that this is so notwithstanding the poverty of his father.⁷³ It has been held that the fact that an infant is abundantly supplied with money, so that he can purchase necessities for cash if he chooses, is not equivalent to being supplied, and he will nevertheless be liable for necessities bought on credit; but there is authority to the contrary.⁷⁴

Must Concern His Person.

The things furnished, to come within the term "necessaries," must concern the person of the infant, and not his estate. An infant, therefore, is not bound by contracts for things necessary to carry on a busi-

ard v. Simpkins, 70 Ga. 322. A horse, however, may be necessary for health. Note 65, *supra*. Money furnished to enable an infant to take a necessary trip may be necessary, but not to take a trip for pleasure. *Breed v. Judd*, 1 Gray (Mass.) 455; *McKanna v. Merry*, 61 Ill. 177. Tobacco is *prima facie* not necessary. *Bryant v. Richardson*, 12 Jur. (N. S.) 300.

⁷¹ *Burghart v. Angerstein*, 6 Car. & P. 690; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; *Nicholson v. Spencer*, 11 Ga. 610.

⁷² *Barnes v. Toye*, 13 Q. B. Div. 410; *Davis v. Caldwell*, 12 Cush. (Mass.) 512; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419, 22 Am. Dec. 652; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274; *McKanna v. Merry*, 61 Ill. 180; *Nicholson v. Wilborn*, 13 Ga. 467; *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Burghart v. Angerstein*, 6 Car. & P. 690; *Perrin v. Wilson*, 10 Mo. 451; *Guthrie v. Murphy*, 4 Watts (Pa.) 80, 28 Am. Dec. 681; note 71, *supra*.

⁷³ *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371; *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Ewell*, Lead. Cas. 55; *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Guthrie v. Murphy*, 4 Watts (Pa.) 80, 28 Am. Dec. 681; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419, 22 Am. Dec. 652; *Perrin v. Wilson*, 10 Mo. 451; *TRAINER v. TRUMBULL*, 141 Mass. 530, 6 N. E. 761; *Jones v. Colvin*, 1 McM. (S. C.) 14; *Elrod v. Myers*, 2 Head (Tenn.) 33, 75 Am. Dec. 749; *Kraker v. Byram*, 13 Rich. Law (S. C.) 163; *Freeman v. Bridger*, 49 N. C. 4, 67 Am. Dec. 258; *Hull's Assignees v. Connolly*, 3 McCord (S. C.) 6, 15 Am. Dec. 612. A complaint, however, is not demurrable for failure to allege refusal of the parent or guardian to supply the infant, or that there was no person who could and would support him. *Goodman v. Alexander*, 165 N. Y. 289, 59 N. E. 145, 55 L. R. A. 781.

⁷⁴ *Burghart v. Hall*, 4 Mees. & W. 727. But see *Rivers v. Greggs*, 5 Rich. Eq. (S. C.) 274; *Barnes v. Toye*, 13 Q. B. Div. 410.

ness into which he enters.⁷⁵ He is not liable for materials purchased and used for the erection of a house on his land,⁷⁶ and it has even been held that he is not liable for the expense of repairing his dwelling house on a contract made by him therefor, although the repairs may have been necessary to prevent immediate and serious injury to the house.⁷⁷

Money.

Money, as such, is not regarded as necessary. "An infant," it was said in a New York case, "is not answerable for money borrowed, though expended by him for necessities; nor for money borrowed to buy necessities, unless it was actually so applied. And perhaps the infant is not answerable in that case, unless the lender either lays out the money himself, or sees it laid out, for necessities. But where this is done the infant is answerable for the money the same as he would have been for the necessities had they been directly furnished by the lender."⁷⁸

Necessaries to Wife and Children.

A man is bound by law to support and care for his wife, and an infant is therefore liable for necessities furnished her.⁷⁹ And he has

⁷⁵ *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189; *Mason v. Wright*, 13 Metc. (Mass.) 306; *Stern v. Meikleham*, 56 Hun. 475, 10 N. Y. Supp. 216; *Paul v. Smith*, 41 Mo. App. 275; *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *State v. Howard*, 88 N. C. 680; *Wood v. Losey*, 50 Mich. 475, 15 N. W. 557; *Dilk v. Keighley*, 2 Esp. 480.

⁷⁶ *Wornock v. Loar* (Ky.) 11 S. W. 438; *Freeman v. Bridger*, 49 N. C. 1, 67 Am. Dec. 258; *Price v. Jennings*, 62 Ind. 111. Nor is his property subject to a mechanic's lien therefor. *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690.

⁷⁷ *Phillips v. Lloyd*, 18 R. I. 99, 25 Atl. 909; *Tupper v. Cadwell*, 12 Metc. (Mass.) 559, 46 Am. Dec. 704; *Wallis v. Bardwell*, 126 Mass. 366; *West v. Gregg*, 1 Grant (Pa.) Cas. 53. Nor on a contract for insurance of his property. *New Hampshire Ins. Co. v. Noyes*, 32 N. H. 345. Nor for attorney's fees in a suit to protect his property. *Phelps v. Worcester*, 11 N. H. 51. Contra, *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434. Nor for a loan of money to pay off incumbrances. *Bicknell v. Bicknell*, 111 Mass. 265; *Magee v. Welsh*, 18 Cal. 155.

⁷⁸ *Randall v. Sweet*, 1 Denio (N. Y.) 460. And see *Kilgore v. Rich*, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780; *Swift v. Bennett*, 10 Cush. (Mass.) 436; *Genereux v. Sibley*, 18 R. I. 43, 25 Atl. 345; *Price v. Sanders*, 60 Ind. 310; *Haine's Adm'r v. Tarrant*, 2 Hill (S. C.) 400; *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Earle v. Peale*, 1 Salk. 387. He may, however, be held liable in equity for money borrowed and expended by him for necessities. *Price v. Sanders*, 60 Ind. 310; *Watson v. Cross*, 2 Duv. (Ky.) 147; *Hickman v. Hall's Adm'rs*, 5 Litt. (Ky.) 338; *Beeler v. Young*, 1 Bibb (Ky.) 521.

⁷⁹ *Contine v. Phillips' Adm'r*, 5 Har. (Del.) 428; *Price v. Sanders*, 60 Ind. 315; *Chapman v. Hughes*, 61 Miss. 339; *Chapple v. Cooper*, 13 Mees. & W. 252, 259; *Turner v. Frisby*, 1 Strange, 168; *People v. Moores*, 4 Denio (N. Y.) 520, 47 Am. Dec. 272.

also been held liable for necessities furnished to his child.⁸⁰ There is, however, authority for the contrary view as to children.⁸¹

Persons Supplying Infant Act at Their Peril.

Whether things supplied to an infant were necessities is to be determined by the infant's actual circumstances. If a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than they really are, or if he supplies goods of a useful class, not knowing that the infant is already sufficiently supplied, he does so at his peril.⁸²

Question of Law or Fact.

Difficulty has arisen in determining the respective provinces of the court and jury in ascertaining whether things supplied to an infant were necessities. It is frequently stated in the American cases that the question whether articles come within the class of necessities is for the court, and that the question whether they were necessities in fact is for the jury.⁸³ In England it has been settled that the question whether the articles were necessities is one of fact, and therefore for the jury; but that, like other questions of fact, it should not be left to the jury unless there is evidence on which they can reasonably find in the affirmative.⁸⁴ Practically, there is little difference in the two rules, for the cases involving articles intrinsically incapable of being necessities are rare, and the question in most cases depends on the particular circumstances.

Express Contract for Necessaries.

The obligation of an infant to pay for necessities being quasi contractual, he is liable without an express contract.⁸⁵ The law creates

⁸⁰ Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; Ex parte Ryder, 11 Paige (N. Y.) 185, 42 Am. Dec. 109; post, pp. 499, 547.

⁸¹ Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499. See Tiffany, Pers. & Dom. Rel. 230, 269.

⁸² Brayshaw v. Eaton, 7 Scott, at page 187; Barnes v. Toye, 13 Q. B. Div. 410; Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Kline v. L'Amoureux, 2 Paige (N. Y.) 419, 22 Am. Dec. 652; Davis v. Caldwell, 12 Cush. (Mass.) 513; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274; Monumental Bldg. Ass'n v. Herman, 33 Md. 131; Perrin v. Wilson, 10 Mo. 451; Nicholson v. Spencer, 11 Ga. 607.

⁸³ Tupper v. Cadwell, 12 Metc. (Mass.) 559, 563, 46 Am. Dec. 704; Merriam v. Cunningham, 11 Cush. (Mass.) 40, 44; Bent v. Manning, 10 Vt. 225; Stanton v. Willson, 3 Day (Conn.) 37, 56, 3 Am. Dec. 255; Glover v. Ott's Adm'r, 1 McCord (S. C.) 572; Beeler v. Young, 1 Bibb (Ky.) 519; Grace v. Hale, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; McKanna v. Merry, 61 Ill. 177.

⁸⁴ Ryder v. Wombwell, L. R. 3 Exch. 93. See, also, Peters v. Fleming, 6 M. & W. 42; Wharton v. Mackenzie, 5 Q. B. 606; Davis v. Caldwell, 12 Cush. (Mass.) 512, per Shaw, C. J.; Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542; Mohney v. Evans, 51 Pa. 80.

⁸⁵ Gay v. Ballou, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; TRAINER v.

an obligation on his part to pay what the necessities are reasonably worth, but his contract is voidable.⁸⁶ If he has given his note or other negotiable instrument in payment, the seller can recover no more than the reasonable value, and on principle, in such a case, there can be no recovery on the note.⁸⁷ In many jurisdictions, however, anomalously, an action may be maintained upon the contract, but the real value will be inquired into, and the recovery limited to that amount.⁸⁸

SAME—RATIFICATION AND AVOIDANCE.

98. Where the contract of an infant is voidable, he may ratify it, and thereby render it binding; or he may disaffirm it, and thereby render it void.

Where the contract of an infant is voidable only, he may ratify it on attaining his majority, and thereby assume the rights and liabilities arising from it; or he may, before ratification, but not afterwards, disaffirm or repudiate it, and thereby escape any liability under it. The reader will remember that such a ratification is an illustration of the class of cases in which a past consideration will support a subsequent promise.⁸⁹ Some contracts are valid unless they are rescinded. Other contracts are invalid unless they are ratified.

When Disaffirmance Necessary.

The rule seems to be that, where an infant acquires an interest in permanent property, to which obligations attach, or enters into a contract which involves continuous rights and duties, benefits and liabilities, and takes benefits under the contract, he may become bound, unless he expressly disaffirms the contract.⁹⁰

TRUMBULL, 141 Mass. 530, 6 N. E. 761; Gregory v. Lee, 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618. See Keener, Quasi Contracts, 20.

⁸⁶ Earle v. Reed, 10 Metc. (Mass.) 387; Davis v. Gay, 141 Mass. 531, 6 N. E. 549; Beeler v. Young, 1 Bibb (Ky.) 519; Parsons v. Keys, 43 Tex. 557; Hyer v. Hyatt, 3 Cranch, C. C. 276, Fed. Cas. No. 6,977; Dubose v. Wheddon, 4 McCord (S. C.) 221; Locke v. Smith, 41 N. H. 346.

⁸⁷ Swasey v. Vanderheyden's Adm'r, 10 Johns. (N. Y.) 33; Fenton v. White, 4 N. J. Law, 111; McMinn v. Richmonds, 6 Yerg. (Tenn.) 9; Bouchell v. Clary, 3 Brev. (S. C.) 194; McCrillis v. How, 3 N. H. 348; Henderson v. Fox, 5 Ind. 489; Morton v. Steward, 5 Ill. App. 533.

⁸⁸ Earle v. Reed, 10 Metc. (Mass.) 387; Bradley v. Pratt, 23 Vt. 378; Dubose v. Wheddon, 4 McCord (S. C.) 221; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; Aaron v. Harley, 6 Rich. Law (S. C.) 26; Askey v. Williams, 74 Tex. 294, 11 S. W. 1101, 5 L. R. A. 176; Guthrie v. Morris, 22 Ark. 411; TRAINER v. TRUMBULL, 141 Mass. 530, 6 N. E. 761.

⁸⁹ Ante, p. 140.

⁹⁰ Anson, Contr. (8th Ed.) 109. Some cases declare that, while an infant's executory contracts are inoperative until satisfied, his executed contracts are good until rescinded. Minock v. Shortridge, 21 Mich. 304; Edgerly v. Shaw, 25

As illustrating this rule, an infant lessee, who occupies the premises after reaching his majority, is liable for arrears of rent which accrued during his minority.⁹¹ Persons who have become possessed of shares in a corporation during infancy, if they hold them after they reach their majority, are liable for calls which accrued while they were infants.⁹² An infant may become a partner, and at common law may be entitled to benefits, though not liable for debts, arising from the partnership during his infancy; though equity would not allow him to claim the benefits without being charged with the losses. Unless, on attainment of majority, there is an express rescission and disclaimer of the partnership, the infant will be liable for losses accruing after he became of age. By holding himself out as a partner he contracts a continual obligation, and that obligation remains until he puts an end to it by a disclaimer.⁹³ And so, where shares in a corporation were assigned to an infant who attained his majority some months before an order was made for winding up the company, it was held that, in the absence of any disclaimer of the shares, he was liable as a contributory.⁹⁴

When Ratification is Necessary.

The cases of which we have just been speaking, and which require an express disclaimer to avoid the effect of the contract, are all cases in which an interest was acquired in permanent property to which liabilities attached, or in which the contract entered into by the infant involved continuous rights, duties, and liabilities. If, on the other

N. H. 514, 51 Am. Dec. 349; *Beardsley v. Hotchkiss*, 96 N. Y. 201. But the cases are in conflict, as is shown by the different views entertained as to whether a conveyance is ratified by silence and acquiescence after majority. Post, p. 169. On the other hand, if an infant purchases property and retains it for an unreasonable time after majority without disaffirmance, he is generally held to have ratified. *Boyden v. Boyden*, 9 Metc. (Mass.) 519; *Ellis v. Alford*, 64 Miss. 8, 1 South. 155; post, p. 162.

⁹¹ Rolle, Abr. 731.

⁹² *Northwestern R. Co. v. McMichael*, 5 Exch. 114. It was said in this case: "They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but in truth they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have thereby been placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby becomes liable to all the obligations attached to the estate: for instance, to pay rent in the case of a lease rendering rent, * * * unless they have elected to waive or disagree the purchase altogether, either during infancy or at full age, at either of which times it is competent for an infant to do so."

⁹³ *Goode v. Harrison*, 5 Barn. & Ald. 159; *Miller v. Sims*, 2 Hill (S. C.) 479.

⁹⁴ *Lumsden's Case*, 4 Ch. App. 31.

hand, the promise of the infant is to perform some isolated act, or if the contract is wholly executory, it will not be binding on him unless he expressly ratifies it on coming of age.⁹⁵ As we have seen, if a person who has entered into a partnership during his minority fails to disaffirm the agreement after reaching his majority, and so holds himself out as a partner, he will be liable for debts of the firm contracted after he became of age; but he will not be liable for debts of the firm contracted during his minority, unless he ratifies them.⁹⁶ Some courts hold that his ratification of the partnership agreement is a ratification of debts of the firm contracted during his minority,⁹⁷ and this would seem the proper doctrine; but the contrary has been held.⁹⁸

SAME—WHO MAY AVOID CONTRACT.

- 99. The privilege of infancy is personal to the infant, and he alone can take advantage of it during his life and sanity.**
- 100. On his death, or if he becomes insane, his contracts may be avoided by his heirs, personal representatives, or conservator or guardian.**
- 101. The other party to the contract, not being himself under disability, is bound if the infant chooses to hold him.**

The privilege of infancy is intended to protect the infant, and during his life and sanity he alone can take advantage of it.⁹⁹ It is even

⁹⁵ *Whitney v. Dutch*, 14 Mass. 460, 7 Am. Dec. 229; *Carrell v. Potter*, 23 Mich. 379; *Savage v. Lichlyter*, 59 Ark. 1, 26 S. W. 12. See, also, post, p. 166.

⁹⁶ *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27; *Todd v. Clapp*, 118 Mass. 495; *Bush v. Linthicum*, 59 Md. 344.

⁹⁷ *Salinas v. Bennett*, 33 S. C. 285, 11 S. E. 968; *Miller v. Sims*, 2 Hill (S. C.) 479.

⁹⁸ *Mehlhop v. Rae*, 90 Iowa, 30, 57 N. W. 650; *Crabtree v. May*, 1 B. Mon. (Ky.) 289; *Minock v. Shortridge*, 21 Mich. 304. And see cases cited in note 96, supra.

⁹⁹ *Keane v. Boycott*, 2 H. Bl. 511, *Ewell's Cas.* 17; *HOLT v. WARD CLARENCIEUX*, 2 Strange, 937; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Mansfield v. Gordon*, 144 Mass. 168, 10 N. E. 773; *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873; *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Baldwin v. Rosier* (C. C.) 48 Fed. 810; *Hooper v. Payne*, 94 Ala. 223, 10 South. 431; *Chambers v. Ker*, 6 Tex. Civ. App. 373, 24 S. W. 1118; *Dentler v. O'Brien*, 56 Ark. 49, 19 S. W. 111; *Holmes v. Rice*, 45 Mich. 142, 7 N. W. 772; *Garner v. Cook*, 30 Ind. 331; *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134; *Van Bramer v. Cooper*, 2 Johns. (N. Y.) 279; *Alsworth v. Cordtz*, 31 Miss. 32. In an action, for instance, for enticing away a servant from plaintiff's service, the defendant cannot escape liability by showing that the servant was an infant, and was therefore not bound by his contract with the plaintiff. *Keane v. Boycott*, supra. The surety on a bond given by an infant, and afterwards disaffirmed by him, has been held liable. *Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627.

held that his guardian cannot avoid his contracts for him, though there is some dictum to the contrary.¹⁰⁰ On his death, however, or if he becomes insane, his contracts may be avoided by his heirs,¹⁰¹ his personal representatives,¹⁰² or his guardian or conservator.¹⁰³ The reason of the rule, it has been said, extends only to them because the privilege is conferred for his sole benefit. While living, he should be the exclusive judge of that benefit, and when dead those alone should interfere who legally represent him. Could his contracts be avoided by third persons, the principle would operate, not for his, but for their, benefit; not when he chose to avail himself of his privileges, but when strangers elected to do it.¹⁰⁴

The other party to the contract, not being himself under a disability to contract, cannot avoid it. He is bound if the infant chooses to hold him by ratifying the contract on becoming of age.¹⁰⁵ A court of equity, however, will not grant an infant specific performance of a contract by the adult.¹⁰⁶ Of course, those contracts which are held void, and not merely voidable, at the infant's option, are of no effect at all, and can bind neither party.

¹⁰⁰ See *Oliver v. Houdlet*, 13 Mass. 240, 7 Am. Dec. 134; *Irvine's Heirs v. Crockett*, 4 Bibb (Ky.) 437; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; Cf. *Stafford v. Roof*, 9 Cow. (N. Y.) 626. Post, p. 165.

¹⁰¹ *Illinois Land & Loan Co. v. Bonner*, 75 Ill. 315; *Harvey v. Briggs*, 68 Miss. 60, 8 South. 274; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; *Veal v. Fortson*, 57 Tex. 487; *Ferguson v. Bell's Adm'r*, 17 Mo. 351; *Levering v. Heighe*, 2 Md. Ch. 81, 88; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 248, 19 Am. Dec. 71.

¹⁰² *Parsons v. Hill*, 8 Mo. 135; *Hastings v. Dollarhide*, 24 Cal. 207; *Person v. Chase*, 37 Vt. 650, 88 Am. Dec. 630; *Jefford v. Ringgold*, 6 Ala. 547; *Hussey v. Jewett*, 9 Mass. 100; *Smith v. Mayo*, 9 Mass. 62, 6 Am. Dec. 28; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. (Ky.) 248, 19 Am. Dec. 71.

¹⁰³ *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117.

¹⁰⁴ Though ordinarily a plea of infancy is personal, a beneficiary in a policy on the infant's life may plead it in answer to the company's defense of false warranties in the application; for otherwise an infant's contract of insurance would be in effect binding on him during his minority. *O'Rourke v. Insurance Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

¹⁰⁵ *HOLT v. WARD CLARENCIEUX*, 2 Strange, 937; *Thompson v. Hamilton*, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; *Hunt v. Peake*, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; *Field v. Herrick*, 101 Ill. 110.

¹⁰⁶ *Flight v. Bolland*, 4 Russ. 298.

SAME-TIME OF AVOIDANCE.

102. Executory contracts, or executed contracts relating to personalty, may be avoided by an infant either before or after attaining his majority; but conveyances of land cannot be disaffirmed during minority, though he may enter and take the profits.
103. As a rule, mere lapse of time after attaining his majority will not bar an infant's disaffirmance of his executory contract, but in a few states he is required to disaffirm within a reasonable time.
104. As a rule, executed contracts must be disaffirmed within a reasonable time after attaining majority; but in some states it is held that the right to avoid a conveyance of land is not barred by acquiescence for any period short of that prescribed by the statute of limitations.

An infant's executory contract may be avoided by him at any time, either before or after attaining his majority, by refusing to perform it, and pleading his infancy when sued for breach of the contract.¹⁰⁷

In the case of executed contracts a distinction is made between contracts relating to his land and those relating to his personalty. A deed of land executed by an infant cannot be disaffirmed during his minority. He may enter on the land and take the profits until the time arrives when he has the legal capacity to affirm or disaffirm the deed; but the deed is not rendered void by the entry. It may still be affirmed after he reaches his majority.¹⁰⁸

The rule, however, does not apply to a sale and manual delivery of chattels by an infant. Such a contract may be avoided by him while he is still an infant.¹⁰⁹ In a New York case it was said: "The gen-

¹⁰⁷ *Reeves*, Dom. Rel. 254; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379. An infant may avoid his contracts for personal services during his minority. *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Ray v. Haines*, 52 Ill. 485; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 37; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Vehue v. Pinkham*, 60 Me. 142; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375.

¹⁰⁸ *Welch v. Bunce*, 83 Ind. 382; *Zouch v. Parsons*, 3 Burrows, 1794; *Irvine v. Irvine*, 5 Minn. 61 (Gil. 44); *Hastings v. Dollarhide*, 24 Cal. 195; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *McCormick v. Leggett*, 53 N. C. 425; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Baker v. Kennett*, 54 Mo. 88. An infant, however, may, before attaining his majority, plead infancy in a suit to foreclose a mortgage on land. *Schneider v. Staihr*, 20 Mo. 269.

¹⁰⁹ *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Zouch v. Parsons*, 3 Burrows, 1794; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Shipman v. Horton*, 17 Conn. 481; *Riley v. Mallory*, 33 Conn. 207; *Willis v. Twambly*, 13 Mass. 204; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 245; *Chapin v. Shafer*, 49 N. Y. 407; *Towle v. Dresser*, 73 Me. 252; *Hoyt v. Wilkinson*, 57 Vt. 404; *Carpenter v. Carpenter*,

eral rule is that an infant cannot avoid his contract, executed by himself, and which is therefore voidable only, while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant, or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive.

* * * Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases, and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be that, where the infant can enter and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time: but where the possession is changed, and there is no legal means to regain and hold it in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately."¹¹⁰

The rule is very general, almost universal, that an infant may avoid any contract in relation to his personal property before he is of age.¹¹¹ Some courts have held that he cannot disaffirm a partnership agreement during his minority, so as to recover what he has put into the firm, but must wait until he attains his majority.¹¹² Other courts hold the contrary, on the ground that it is a contract in relation to his personalty, and that all contracts of an infant in relation to personal property may be disaffirmed during his minority.¹¹³

As to whether a contract must be disaffirmed by an infant within a reasonable time after he attains his majority, the authorities are conflicting. In the case of executory contracts requiring ratification to render them binding, the right to avoid them cannot be barred by mere

45 Ind. 142; *Cogley v. Cushman* 16 Minn. 397 (Gil. 354); *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194.

¹¹⁰ *Stafford v. Roof*, supra.

¹¹¹ See *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12 (collecting cases); *Rice v. Beyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Hoyt v. Wilkinson*, 57 Vt. 404; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Willis v. Twambly*, 13 Mass. 204; *Stafford v. Roof*, 9 Cow. (N. Y.) 628; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Petrie v. Williams*, 68 Hun. 589, 23 N. Y. Supp. 237; *Cogley v. Cushman*, 16 Minn. 397 (Gil. 354). Contra: *Lansing v. Railroad Co.*, 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567. And see *Pippen v. Insurance Co.*, 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505.

¹¹² *Dunton v. Brown*, 31 Mich. 182; *Armitage v. Widoe*, 36 Mich. 130; *Bush v. Linthicum*, 59 Md. 344 (but see *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 37).

¹¹³ *Shirk v. Shultz*, 113 Ind. 571, 15 N. E. 12 (collecting cases); *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 37.

silence, without more. It may be otherwise where the circumstances are such as to make it the infant's duty to speak, for in such a case silence or acquiescence may amount to a ratification.¹¹⁴

In the case of conveyances of land, sales and delivery of chattels, and the like, many courts hold that the infant must disaffirm the contract within a reasonable time after he attains his majority, or be held to have ratified it, and to be barred from avoiding it.¹¹⁵ Many courts, however, have held that a conveyance of land by an infant need not be disaffirmed within any period short of that prescribed by the statute of limitations, and that acquiescence for any shorter time will not bar his right to avoid it.¹¹⁶

It is provided by statute in some states that an infant is bound on all his contracts unless he disaffirms them within a reasonable time.¹¹⁷

SAME—WHAT AMOUNTS TO A RATIFICATION.

- 105. In some jurisdictions, by statute, ratification of a contract by an infant must, subject to specified exceptions, be in writing, signed by him or his agent.**
- 106. In the absence of such a provision, ratification may be by an express new promise, orally or in writing; or it may be implied from declarations or conduct clearly showing an intention to be bound.**
- 107. The promise must be made or the acts done by the infant understandingly, but the cases are in conflict as to whether knowledge of the legal right to avoid the contract is necessary.**

¹¹⁴ Ante, p. 162; post, p. 169.

¹¹⁵ *Delano v. Blake*, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 18 N. W. 283, 47 Am. Rep. 798 (collecting the cases pro and con); *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Dolph v. Hand*, 156 Pa. 91, 27 Atl. 114, 36 Am. St. Rep. 25; *Amey v. Cockey*, 73 Md. 297, 20 Atl. 1071; *Ihley v. Padgett*, 27 S. C. 300, 3 S. E. 468; *Sanders v. Bennett* (Ky.) 1 S. W. 436; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Aldrich v. Funk*, 48 Hun, 367, 1 N. Y. Supp. 543; *Ward v. Laverty*, 19 Neb. 429, 27 N. W. 393; *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089; *Kline v. Beebe*, 6 Conn. 506. An infant's delay of less than six months after majority in avoiding a deed of land, with knowledge that purchasers from his grantee are making improvements, does not estop him. *Rundle v. Spencer*, 67 Mich. 189, 34 N. W. 548.

¹¹⁶ *Drake's Lessees v. Ramsay*, 5 Ohio, 251; *Prout v. Wiley*, 28 Mich. 164; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Wells v. Seixas* (C. C.) 24 Fed. 82; *Richardson v. Pate*, 93 Ind. 432, 47 Am. Rep. 374; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Eagan v. Scully*, 29 App. Div. 617, 51 N. Y. Supp. 680, affirmed 173 N. Y. 581, 65 N. E. 1116; *Shipp v. McKee*, 80 Miss. 741, 32 South. 281, 92 Am. St. Rep. 616.

¹¹⁷ *Leacox v. Griffith*, 76 Iowa, 89, 40 N. W. 109; *Mehlhop v. Rae*, 90 Iowa, 30, 57 N. W. 650; *Hegler v. Faulkner*, 153 U. S. 109, 14 Sup. Ct. 779, 38 L. Ed. 653 (under Nebraska statute); *Johnson v. Storie*, 32 Neb. 610, 49 N. W. 371.

In some jurisdictions it is declared by statute that, with specified exceptions, no action shall be maintained on any contract made by an infant, unless he, or some person lawfully authorized, ratified it in writing after he attained his majority.¹¹⁸ In the absence of such a provision, ratification may either be by an express new promise, made orally or in writing, or it may be implied from acts or declarations clearly showing an intention to recognize the contract, and to be bound by it. The new promise, whether in writing or oral, or evidenced by conduct, must be clear and unequivocal, and must show an intention to be bound.¹¹⁹

A mere acknowledgment of the contract, without a promise to be bound, express or implied, is not sufficient.¹²⁰ Where there is a new promise, it must be made to the other party or his agent;¹²¹ and if it is not absolute, but conditional—as, for instance, where it is a promise to pay or otherwise perform when able—the condition must be fulfilled before any liability attaches.¹²²

It has frequently been held that to render an act or promise binding as a ratification it must be performed or made with knowledge that there was in law no liability on the original contract.¹²³ There are many cases, however, which hold that knowledge of the law is not necessary, or, rather, must be presumed.¹²⁴

There need be no fresh consideration for the new promise, for, as we have seen, this is one of the cases in which a past consideration is sufficient.¹²⁵

¹¹⁸ *Bird v. Swain*, 79 Me. 529, 11 Atl. 421.

¹¹⁹ *Whitney v. Dutch*, 14 Mass., at page 460. 7 Am. Dec. 229; *Carrell v. Potter*, 23 Mich. 379. And see notes 126-131, *infra*.

¹²⁰ *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Hale v. Gerrish*, 8 N. H. 374.

¹²¹ *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Bigelow v. Grannis*, 2 H&M (N. Y.) 120.

¹²² *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Thompson v. Lay*, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; *Proctor v. Sears*, 4 Allen (Mass.) 95.

¹²³ *Harner v. Killing*, 5 Esp. 103; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305; *Thing v. Libbey*, 16 Me. 55; *Trader v. Lowe*, 45 Md. 1; *Smith v. Mayo*, 9 Mass. 62. 6 Am. Dec. 28; *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Reed v. Boshears*, 4 Sneed (Tenn.) 118; *Norris v. Vance*, 3 Rich. Law (S. C.) 164; *Burdett v. Williams* (D. C.) 30 Fed. 697; *Bresee v. Stanly*, 119 N. C. 278, 25 S. E. 970. No ratification, if adult is ignorant that he was an infant when he made the contract. *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464.

¹²⁴ *Morse v. Wheeler*, 4 Allen (Mass.) 570; *Taft v. Sergeant*, 18 Barb. (N. Y.) 321; *Anderson v. Soward*, 40 Ohio St. 325, 48 Am. Rep. 687; *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 South. 399; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774; *Ring v. Jamison*, 66 Mo. 424; *Bestor v. Hickey*, 71 Conn. 181, 41 Atl. 555.

¹²⁵ *Ante*, p. 140.

Implied Ratification.

Unless a statute so requires, an express promise in terms is not necessary in order to constitute ratification of an obligation incurred during infancy. "Where the declarations or acts of the individual after becoming of age," said the Vermont court, "fairly and justly lead to the inference that he intended to and did recognize and adopt as binding an agreement executory on his part, made during infancy, and intended to pay the debt then incurred, we think it is sufficient to constitute ratification, provided the declarations were freely and understandingly made, or the acts in like manner performed, and with knowledge that he was not legally liable."¹²⁶

The courts go much further than this, and hold substantially that any intelligent conduct by a person, after attaining his majority, inconsistent with the nonexistence of a contract, executory or executed, will, as a rule, amount to an affirmance of the contract.¹²⁷ If, for instance, an infant takes a lease, and after becoming of age recognizes it by occupying under it, or if, having given a lease, he accepts rent after becoming of age, his conduct amounts to a ratification.¹²⁸ So, also, a purchase of land or chattels by an infant is ratified if he retains and uses the property for an unreasonable time after attaining his majority, or if he sells it to a third person, or otherwise disposes of it.¹²⁹

¹²⁶ *Hatch v. Hatch's Estate*, 60 Vt. 160, 13 Atl. 791. And see *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245; *Baker v. Kennett*, 54 Mo. 88; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251; *Emmons v. Murray*, 16 N. H. 385; *Drake v. Wise*, 36 Iowa, 476; *Hale v. Gerrish*, 8 N. H. 374; *Middleton v. Hoge*, 5 Bush (Ky.) 478 (collecting cases); *Barlow v. Robinson*, 174 Ill. 317, 51 N. E. 1045. See *Ewell, Lead. Cas.* 173-180.

¹²⁷ *Henry v. Root*, 33 N. Y. 526 (collecting cases). Where an infant buys land, and gives a mortgage to secure the purchase money, a sale and conveyance of the land after he becomes of age is a ratification of the mortgage. *Uecker v. Koehn*, 21 Neb. 559, 32 N. W. 583, 59 Am. Rep. 849. And see *Callis v. Day*, 38 Wis. 643. Acceptance of part of the proceeds of a sale under a deed of trust given while an infant. *Darraugh v. Blackford*, 84 Va. 509, 5 S. E. 542. Taking releases of part of premises mortgaged during infancy, and acquiescence for two years. *Wilson v. Darragh*, 55 Hun, 605, 7 N. Y. Supp. 810.

¹²⁸ *Ashfield v. Ashfield*, W. Jones, 157; *Paramour v. Yardley*, Plowd. 546.

¹²⁹ *Henry v. Root*, 33 N. Y. 526; *Lawson v. Lovejoy*, 8 Me. 405, 23 Am. Dec. 526; *Boyden v. Boyden*, 9 Metc. (Mass.) 519; *Robbins v. Eaton*, 10 N. H. 561; *Hubbard v. Cummings*, 1 Me. 11; *Boody v. McKenney*, 23 Me. 517; *Ellis v. Alford*, 64 Miss. 8, 1 South. 155; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538; *Cheshire v. Barrett*, 4 McCord (S. C.) 241, 17 Am. Dec. 735; *Deason v. Boyd*, 1 Dana (Ky.) 45; *Shropshire v. Burns*, 46 Ala. 108; *Aldrich v. Grimes*, 10 N. H. 194; *Dana v. Coombs*, 6 Greenl. (Me.) 89, 19 Am. Dec. 194; *Armfield v. Tate*, 29 N. C. 258; *Callis v. Day*, 38 Wis. 643; *Hilton v. Shepherd*, 92 Me. 160, 42 Atl. 387. This is expressly declared by statute in some states. See *McKamy v. Cooper*, 81 Ga. 679, 8 S. E. 312. Retaining property after tendering it on disaffirmance, and on the other's refusal to receive it, is not a ratification. *House v. Alexander*, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

The receipt of, or a suit to recover, the purchase money of property sold by him, or suit to enforce any other kind of contract, would amount to a ratification of the contract.¹³⁰ Generally speaking, the act relied upon as a ratification must show an intention to affirm the contract; but the decisions are not in accord as to what acts are sufficient to show such an intention. Disposing of the property received under the contract, and the other acts above mentioned, would clearly show such intention; but where an infant has executed a conveyance, a mere offer, after attaining his majority, to execute a confirmatory deed if the other party will pay the balance of the purchase money, which offer is refused, clearly could not be regarded as a ratification of the sale and conveyance.¹³¹

Mere silence or acquiescence after becoming of age, without more, does not, as a rule, amount to a ratification.¹³² It is otherwise where the contract is one which requires disaffirmance, and there is a failure to disaffirm for an unreasonable time, under such circumstances as to lead others to act to their prejudice.¹³²

And see *Scott v. Scott*, 29 S. C. 414, 7 S. E. 811. The retention by a person, after becoming of age, of material furnished him during his minority in the construction of his house, is not a ratification of his purchase of the material, for he cannot return it. *Bloomer v. Nolan*, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690.

¹³⁰ *Morrill v. Aden*, 19 Vt. 505; *Ferguson v. Bell's Adm'r*, 17 Mo. 347; *Pursley v. Hays*, 17 Iowa, 310. Where an infant takes a deed and gives back a purchase-money mortgage, and the property is sold under the mortgage, the infant after his majority, by bringing ejectment against the purchaser, not only affirms the deed, but the mortgage. *Kennedy v. Baker*, 159 Pa. 146, 28 Atl. 252.

¹³¹ *Craig v. Van Bebbler*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569. Where a note by an infant remains in part unpaid, mere acknowledgment of the debt, or payment of interest or part of principal, after becoming of age, is not a binding affirmance. *Kendrick v. Neisz*, 17 Colo. 506, 30 Pac. 245. *Contra*, *American Mortgage Co. v. Wright*, 101 Ala. 658, 14 South. 399. So, where land has been purchased, and installment notes given by an infant, payment of some after becoming of age is not of itself a ratification. *Rapid Transit Land Co. v. Sanford* (Tex. Civ. App.) 24 S. W. 587. The recital in a mortgage executed after attaining majority, that it is subject to a mortgage executed during infancy, is a ratification of the prior mortgage. *Ward v. Anderson*, 111 N. C. 115, 15 S. E. 933.

¹³² *Durfee v. Abbott*, 61 Mich. 471, 68 N. W. 521; *Irvine v. Irvine*, 9 Wall. 618, 19 L. Ed. 800; *Tyler v. Fleming*, 68 Mich. 185, 35 N. W. 902, 13 Am. St. Rep. 336; *Hill v. Nelms*, 86 Ala. 442, 5 South. 796. But see *Delano v. Blake*, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; ante, p. 165.

¹³³ *Langdon v. Clayson*, 75 Mich. 204, 42 N. W. 805; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Dolph v. Hand*, 153 Pa. 91, 27 Atl. 114, 36 Am. St. Rep. 25; *Wheaton v. East*, 5 Yerg. 41, 62, 26 Am. Dec. 258; *Hartman v. Kendall*, 4 Ind. 403; *Wallace's Lessee v. Lewis*, 4 Har. (Del.) 80.

SAME—WHAT AMOUNTS TO DISAFFIRMANCE.

108. A contract is disaffirmed by any conduct which is inconsistent with the existence of the contract, and shows an intention not to be bound by it.

Disaffirmance, like ratification, may be implied, and it will generally be implied from conduct clearly inconsistent with the existence of the contract.¹³⁴ Where, for instance, a person who has sold and conveyed or mortgaged land or goods while an infant, sells, leases, or mortgages the same to another after becoming of age, this is a disaffirmance of his contract.¹³⁵ An action by a person, after becoming of age, to recover goods or land sold by him during his minority, is a disaffirmance of the sale;¹³⁶ and a contract is disaffirmed by merely pleading infancy when suit is brought against him to enforce it.

At one time disaffirmance of a deed of land was required to be by some act as high and solemn as the deed; but, according to the weight of authority, this solemnity is no longer necessary, and a deed may be effectually avoided by any acts or declarations disclosing an unequivocal intent to repudiate it.¹³⁷

¹³⁴ *Pyne v. Wood*, 145 Mass. 558, 14 N. E. 775; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Dallas v. Hollingsworth*, 3 Ind. 537.

¹³⁵ *Tucker v. Moreland*, 10 Pet. 58, 9 L. Ed. 345; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173; *Corbett v. Spencer*, 63 Mich. 731, 30 N. W. 385; *Haynes v. Bennett*, 53 Mich. 15, 18 N. W. 539; *Dawson v. Helmes*, 30 Minn. 107, 14 N. W. 462; *Chapin v. Shafer*, 49 N. Y. 407; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Cresinger v. Welch's Lessee*, 15 Ohio, 156, 45 Am. Dec. 565; *Pitcher v. Layrock*, 7 Ind. 398; *McGan v. Marshall*, 7 Humph. (Tenn.) 121; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464. In some jurisdictions a person is not allowed to convey land which is in the adverse possession of another. Here, therefore, an infant cannot avoid his deed of land by a second deed, executed while his first grantee or another is in the adverse possession of the land. He must first make an entry. *Harrison v. Adcock*, 8 Ga. 68. See *Bool v. Mix*, 17 Wend. (N. Y.) 133, 31 Am. Dec. 285.

¹³⁶ *Clark v. Tate*, 7 Mont. 171, 14 Pac. 761; *Craig v. Van Bebbler*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; *Philips v. Green*, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124; *Stotts v. Leonhard*, 40 Mo. App. 336; *Scott v. Buchanan*, 11 Humph. (Tenn.) 469; *Hughes v. Watson*, 10 Ohio, 134. Where, however, the action is based on the assumption that defendant is wrongfully in possession, as in the case of ejectment, the weight of authority seems to require that there shall have been some previous act of disaffirmance on the part of the infant, for until disaffirmance defendant is rightfully in possession. See *Law v. Long*, 41 Ind. 586; *McClanahan v. Williams*, 136 Ind. 30, 35 N. E. 897; *Bool v. Mix*, 17 Wend. (N. Y.) 135, 31 Am. Dec. 285; *Clawson v. Doe*, 5 Blackf. (Ind.) 300; *Wallace's Lessee v. Lewis*, 4 Har. (Del.) 75.

¹³⁷ *McCarty v. Iron Co.*, 92 Ala. 463, 8 South. 417, 12 L. R. A. 136. And see note 135, *supra*.

SAME—EXTENT OF RATIFICATION OR DISAFFIRMANCE.

- 109. The ratification or disaffirmance must be in toto. The contract cannot be ratified or disaffirmed in part only.**

The disaffirmance or ratification must go to the whole contract. An infant cannot ratify a part which he deems for his benefit, and repudiate the rest.¹³⁸ He cannot, for instance, ratify a lease to himself, and avoid a covenant in it to pay rent; nor can he hold lands conveyed to him in exchange, and avoid the transfer of those with which he parted;¹³⁹ nor can he hold land conveyed to him, and repudiate a mortgage given at the time as part of the same transaction to secure the purchase money.¹⁴⁰

As a rule, a person cannot retain property purchased by him during infancy, and repudiate the contract under which he received it; nor can he disaffirm a sale by him, and retain the consideration received; but as to this there is much conflict, and we must go into the subject at some length.

SAME—RETURN OF CONSIDERATION.

- 110. An infant may disaffirm his executory contract without first returning the consideration he has received; but after disaffirmance he must return the consideration, if he has it.**
- 111. If the contract has been executed by him, he cannot avoid it, and recover what he has paid, or for what he has done, without returning the consideration if he has it; but, by the weight of authority, if he has squandered or otherwise disposed of it during his minority, it is otherwise.**

EXCEPTIONS—(a) Though the infant has the consideration, he may effectually disaffirm his executed contract without its return as a condition precedent, if he does not affirmatively seek relief; as, for instance, where he disaffirms his conveyance of land by conveying to another.

- (b)** Some courts hold that an infant cannot recover what he has paid, or for what he has done, under a contract by which he has received a substantial benefit, unless he can and does place the other party in statu quo. This probably does not apply to his conveyances of land.

¹³⁸ *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Lowry v. Drake's Heirs*, 1 Dana (Ky.) 46. Cf. *O'Rourke v. Insurance Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643.

¹³⁹ *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538.

¹⁴⁰ *Hubbard v. Cummings*, 1 Greenl. 11; *Uecker v. Koehn*, 21 Neb. 559, 32 N. W. 583, 59 Am. Rep. 849; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Heath v. West*, 28 N. H. 108; *Young v. McKee*, 13 Mich. 556; *Skinner v. Maxwell*, 66 N. C. 45; *Cogley v. Cushman*, 16 Minn. 402 (Gil. 354); *Callis v.*

As we have just stated, when a person avoids a contract made by him during his minority, he must, as a rule, return the consideration he has received.¹⁴¹ As to whether or not he must do so as a condition precedent to disaffirmance, or whether the other party must be left to his action to recover the consideration after disaffirmance, and as to whether the consideration must be returned where it has been wasted or otherwise disposed of, the decisions are conflicting.

(a) Where the contract is executory on the part of the infant, and he has not ratified it by his conduct, as explained above,¹⁴² it cannot, according to the weight of authority, be enforced against him, even though he retains the consideration received by him in kind. He need not return the consideration as a condition precedent to repudiating the contract and pleading his infancy in an action brought against him to enforce it.¹⁴³ When he repudiates his contract, however, he no longer has any right to the consideration he has received, and at least, if he has it, the other party may maintain an action to recover it.¹⁴⁴ According to the weight of authority, if he has disposed of the consideration so that he cannot return it in kind, he cannot be held liable for it. The adult is remediless.¹⁴⁵ It must be remembered that retaining the consideration may amount to a ratification.

(b) Where the contract is executed on the part of the infant, and he has the consideration received by him in kind, many cases hold that he cannot repudiate the contract, and recover what he has parted with, unless he returns, or offers to return, the consideration.¹⁴⁶ Many cases,

Day, 38 Wis. 643; *Ready v. Pinkham*, 181 Mass. 351, 63 N. E. 887. Cf. *Nottingham, etc., Soc. v. Thurston*, 19 L. T. R. 54 (H. L.).

¹⁴¹ *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Wilhelm v. Hardman*, 13 Md. 140; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Combs v. Hawes* (Cal.) 8 Pac. 597 (statutory); *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; *Bartlett v. Cowles*, 15 Gray (Mass.) 446.

¹⁴² Ante, p. 168.

¹⁴³ *Craighead v. Wells*, 21 Mo. 409; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194. See, also, *Nichols & Shepard Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516.

¹⁴⁴ *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209. Where an infant bought of another infant, and paid the price, and after the seller had spent the money the buyer disaffirmed the contract, and brought action to recover the money paid both in contract and in tort, it was held that the defendant's plea of infancy was a defense to the count in contract, and that there was no dealing with the money by the defendant which could constitute conversion. *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

¹⁴⁵ See *Brawner v. Franklin*, 4 Gill (Md.) 470; *Boody v. McKenney*, 23 Me. 517, 525. And see post, p. 178.

¹⁴⁶ See *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Lemmon v. Beeman*, 45 Ohio St. 505, 15 N. E. 476; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Robinson v. Weeks*, 56 Me. 102; *Johnson v. Insurance Co.*, 56 Minn. 365, 57

on the other hand, go to the extent of saying without qualification that the return of the consideration in such a case is not a condition precedent to the right to disaffirm and recover what has been parted with; although, if the infant still retains the consideration, the adult may reclaim it, or, upon demand and refusal, recover in trover.¹⁴⁷ That return of the consideration is not a condition to disaffirmance, where the disaffirmance by the infant is by dealing with the property he has parted with as his own, and where he is not seeking the aid of a court to recover it, is everywhere conceded; as where, having sold land and received the purchase money, he disaffirms by conveying the land to another. The latter deed is effectual though he has not returned the consideration for his prior deed.¹⁴⁸

(c) According to the weight of authority, an infant, on attaining his majority, may disaffirm his contract, whether it is executory or executed, and in the latter case may recover back what he has parted with, or for what he has done, without returning or offering to return the consideration received by him, if, during his minority, he has squandered or otherwise disposed of it so that he cannot return it.¹⁴⁹

N. W. 534, 26 L. R. A. 187, 45 Am. St. Rep. 473; *Lane v. Iron Co.*, 101 Tenn. 581, 48 S. W. 1094. See, also, cases cited *infra*, note 151.

Money borrowed by an infant mortgagor and used to pay off prior liens and for permanent improvements will be regarded in equity as in his hands; and in a suit to foreclose the mortgage after disaffirmance, relief may be given by a sale of the property and the application of the proceeds in such manner as to place the mortgagee in statu quo, provided this can be done without depriving the mortgagor of an interest equivalent to that which he had in the property at the time the mortgage was executed. *MacGreal v. Taylo*. 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed. 326. Cf. *Nottingham, etc., Society v. Thurston*, 19 L. T. R. 54 (H. of L.), affirming s. c. [1902] 1 Ch. 1 (C. A.), reversing s. c. [1901] 1 Ch. 88.

¹⁴⁷ *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Tucker v. Moreland*, 10 Pet. 58, 73, 9 L. Ed. 345; *Shaw v. Boyd*, 5 Serg. & R. (Pa.) 309, 9 Am. Dec. 368; *McCarty v. Iron Co.*, 92 Ala. 463, 8 South. 417, 12 L. R. A. 136; *Shirk v. Saultz*, 113 Ind. 571, 15 N. E. 12; *Drude v. Curtis*, 183 Mass. 317, 67 N. E. 317, 62 L. R. A. 755.

¹⁴⁸ *Dawson v. Helmes*, 34 Minn. 107, 14 N. W. 462.

¹⁴⁹ *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; *Boody v. McKenney*, 23 Me. 517; *Lemmon v. Leeman*, 45 Ohio St. 505, 15 N. E. 476; *Reynolds v. McCurry*, 100 Ill. 356; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Mordecai v. Pearl*, 63 Hun, 553, 18 N. Y. Supp. 543; *Petrie v. Williams*, 68 Hun, 589, 23 N. Y. Supp. 237; *Brandon v. Brown*, 106 Ill. 519; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 563; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Harvey v. Briggs*, 68 Miss. 60, 8 South. 274, 10 L. R. A. 62; *Englebert v. Troxell*, 40 Neb. 195, 58 N. W. 852, 26 L. R. A. 177, 42 Am. St. Rep. 665; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464; *MacGreal v. Taylor*, 167 U. S. 688, 17 Sup. Ct. 961, 42 L. Ed.

He is not bound to return an equivalent. Some of the courts extend this rule to cases in which the infant was even benefited by disposing of the consideration.¹⁶⁰ The principle on which this rule is based is that the privilege of the infant to avoid his contracts is intended to protect him against the improvidence which is incident to his immaturity, and that to require him to return the consideration received and squandered or otherwise disposed of during his minority would be to withdraw this protection, and frustrate the object of the law. This rule has been applied, not only where the contract was a sale and conveyance of land by the infant, but to sales of personalty and other contracts as well.

(d) Many courts, on the other hand, apply the principle that the privilege of an infant is intended as a shield, and not as a sword,—or, in other words, as a protection to the infant, and not as an instrument of fraud and injustice to others,—hold, or have held, that an infant cannot avoid his executed contracts, whereby he has benefited, and recover what he has parted with, or for what he has done, unless he can and does restore the consideration he has received; and that it is immaterial that the consideration has been disposed of by him, or for any other reason cannot be returned. In other words, they hold that an infant who receives a substantial consideration for his executed contract cannot, on attaining his majority, avoid the contract, and recover what he has parted with, unless he can and does place the other party in statu quo.¹⁶¹

326; *Bullock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849; *White v. Cotton Waste Corp.*, 178 Mass. 20, 59 N. E. 642; *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265.

¹⁶⁰ A minor who contracts with his employer that the price of articles, not necessities, purchased by him from his employer, shall be deducted from his wages, may, on becoming of age, repudiate his contract, and recover his wages without deduction; and this, even though he may have disposed of the articles to his benefit. *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263. And see *Genereux v. Sibley*, 18 R. I. 43, 25 Atl. 345.

¹⁶¹ *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Wilhelm v. Hardman*, 13 Md. 140; *Holden v. Pike*, 14 Vt. 405, 39 Am. Dec. 228; *Womack v. Womack*, 8 Tex. 397, 417, 58 Am. Dec. 119; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113. The right to avoid is conditional on his restoring what he received in specie, or, if he cannot, on his accounting for its value. *Heath v. Stevens*, 48 N. H. 251; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Bartlett v. Bailey*, 59 N. H. 408; *Riley v. Mallory*, 33 Conn. 201. In England the right to avoid an executed sale and recover back the price is denied. *Holmes v. Blogg*, 8 Taunt. 508; *Ex parte Taylor*, 8 De G. M. & G. 258. See, also, *Williams v. Pasquali*, Peake, Add. Cas. 197; *Valentini v. Canali*, 24 Q. B. D. 166. Where the personal contract of an infant is fair and reasonable, and free from fraud or undue influence, and has been wholly or partly performed on both sides, so that the infant has enjoyed the benefits of it, but has parted with what he has received, or the benefits are of such a nature that he cannot restore them, he cannot recover back what he has paid. *John-*

SAME—EFFECT OF RATIFICATION AND DISAFFIRMANCE.

- 112. Ratification renders the contract absolutely binding ab initio.**
- 113. Disaffirmance renders the contract absolutely void ab initio, and the rights of the parties are determined as if there had never been a contract between them.**
- 114. Third parties, therefore, acquire no rights under an avoided contract.**

Disaffirmance of a contract relates back to the date of the contract, and renders it void on both sides *ab initio*; ¹⁵² and it follows that the rights of the parties must be determined as if there never had been any contract. One, therefore, who has occupied land under a deed by an infant which is avoided by him on becoming of age is liable for rents during the time of his occupation, just as if there had been no deed. ¹⁵³ If the infant's vendee has sold the property to a third person, the latter occupies no better position than the vendee, and the property may be recovered from him even though he was a purchaser for value, and without notice of the defeasible nature of the title. ¹⁵⁴

Where services have been rendered by an infant under a voidable contract, and he has received nothing under it, he may, on disaffirming the contract, recover the value of the services as upon an implied contract. ¹⁵⁵ In such a case he may, according to the better opinion, recover without any deduction for damages caused by his breach of the contract, for to allow such a deduction would be, in effect, to enforce

son v. Insurance Co., 56 Minn. 365, 57 N. W. 934, 26 L. R. A. 187, 45 Am. St. Rep. 473; Alt v. Graff, 65 Minn. 191, 68 N. W. 9. See, also, Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703. Cf. Gillis v. Goodwin, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265.

¹⁵² Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; French v. McAndrew, 61 Miss. 187; Boyden v. Boyden, 9 Metc. (Mass.) 519; Hoyt v. Wilkinson, 57 Vt. 404; Mette v. Feltgen (Ill.) 27 N. E. 911; Id., 148 Ill. 357, 36 N. E. 81; Derocher v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; Vent v. Osgood, 19 Pick. (Mass.) 572.

¹⁵³ French v. McAndrew, 61 Miss. 187.

¹⁵⁴ Hill v. Anderson, 5 Smedes & M. (Miss.) 216; Mustard v. Wohlford's Heirs, 15 Grat. (Va.) 329, 76 Am. Dec. 209; Searcy v. Hunter, 81 Tex. 644, 17 S. W. 372, 26 Am. St. Rep. 837; Downing v. Stone, 47 Mo. App. 144; Miles v. Lingerman, 24 Ind. 385.

¹⁵⁵ Medbury v. Watrous, 7 Hill (N. Y.) 110; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Vent v. Osgood, 19 Pick. (Mass.) 572; Ray v. Haines, 52 Ill. 485; Judkins v. Walker, 17 Me. 38, 35 Am. Dec. 229; Velue v. Pinkham, 60 Me. 142; Lowe v. Sinklear, 17 Mo. 308; Dallas v. Hollingsworth, 3 Ind. 537; Lufkin v. Mayall, 25 N. H. 82; Dearden v. Adams, 19 R. I. 217, 36 Atl. 3. But he can recover no more than he is equitably entitled to under all the circumstances. Hagerty v. Lock Co., 62 N. H. 576.

the contract.¹⁵⁶ So, also, if an infant has paid money or parted with other property under a voidable contract, and has himself received nothing, he may recover what he has parted with on avoiding the contract.¹⁵⁷ As to whether an infant who has received something under his contract can avoid it and recover what he has parted with, or for what he has done, the authorities are conflicting. We have already discussed this question, and shown the different positions which the courts have taken.¹⁵⁸

A disaffirmance cannot be retracted. Ratification of a contract after it has once been disaffirmed comes too late.¹⁵⁹

SAME—TORTS IN CONNECTION WITH CONTRACTS.

115. Though an infant is liable for his torts, a breach of contract cannot be treated as a tort, so as to make him liable. The tort must be separate and independent of it.

116. At common law, though it is otherwise in equity, an infant's false representations as to his age will not estop him from avoiding his contract; they may, however, render him liable in an action for deceit.

Though an infant is liable for his torts, it is well settled that a breach of contract cannot be treated as a tort, so as to make him liable. The wrong, according to the weight of authority, must be more than a misfeasance in the performance of the contract, and must be separate from and independent of it.¹⁶⁰ Where, for instance, an infant hired a horse to ride, and injured it by overriding, it was held that he could

¹⁵⁶ *Derocher v. Continental Mills*, 58 Me. 217, 4 Am. Rep. 286; *Whitmarsh v. Hall*, 3 Denio (N. Y.) 375; *Radley v. Kenedy* (City Ct. Brook.) 14 N. Y. Supp. 268. But see *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690. The defendant may set off any legal claim against the infant; as, for instance, for necessities furnished him. *Meredith v. Crawford*, 34 Ind. 399.

¹⁵⁷ *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Corpe v. Overton*, 10 Bing. 252; *Millard v. Hewlett*, 19 Wend. (N. Y.) 301. And see cases cited in note 149, supra.

¹⁵⁸ Ante, p. 171.

¹⁵⁹ *McCarty v. Iron Co.*, 92 Ala. 463, 8 South. 417, 12 L. R. A. 136; *Pippen v. Insurance Co.*, 130 N. C. 23, 40 S. E. 822, 57 L. R. A. 505.

¹⁶⁰ *Jennings v. Rundall*, 8 Term R. 335, Ewell, Lead. Cas. 185; *Gilson v. Spear*, 38 Vt. 311, 38 Am. Dec. 659; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Freeman v. Roland*, 14 R. I. 39, 51 Am. Rep. 340; *West v. Moore*, 14 Vt. 447, 39 Am. Dec. 235; *Campbell v. Perkins*, 8 N. Y., at page 440; *Campbell v. Stakes*, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; *Mathews v. Cowan*, 59 Ill. 341; *Penrose v. Curren*, 3 Rawle (Pa.) 351, 24 Am. Dec. 356. But see *Vance v. Word*, 1 Nett & McC. (S. C.) 197, 9 Am. Dec. 683; *Peigne v. Sutcliffe*, 4 McCord (S. C.) 387, 17 Am. Dec. 756; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 55 Am. Rep. 53; *Fitts v. Hall*, 9 N. H. 441. An infant cannot be held liable

not be made liable upon the contract by framing the action in tort for negligence.¹⁶¹ Where, on the other hand, an infant hired a horse expressly for riding, and not for jumping, and then lent it to a friend, who killed it in jumping, he was held liable, because what he had done was not an abuse of the contract, but an act which he was expressly forbidden to do, and was, therefore, independent of the contract.¹⁶²

The fraud of an infant in falsely representing himself to be of age, and so inducing another to contract with him, does not estop him from pleading his infancy if sued upon his contract.¹⁶³ He may, however, in many jurisdictions, be held liable in an action for deceit.¹⁶⁴ In equity, where the infant has falsely represented that he was of age, or taken active steps to conceal his age, or been otherwise guilty of fraud, and has thereby induced the other party to enter into the contract, his

for false warranty on an exchange of horses, since it is "a case in which the assumpsit is clearly the foundation of the action; for it is in fact undertaking that the horse was sound." An infant is not bound on his warranties in an application for insurance, and the insurer cannot defend an action on the policy by proving their falsity. *O'Rourke v. Insurance Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643. *Green v. Greenbank*, 2 Marsh. 485. A promise by an infant to marry is not binding on him, but he may nevertheless be held liable for his tort in seducing a woman under promise of marriage. *Becker v. Mason*, 93 Mich. 336, 53 N. W. 361.

¹⁶¹ *Jennings v. Rundall*, 8 Term R. 335. He may, however, sue in trespass, though he cannot bring an action on the case, as the latter, but not the former, would be based on lawful possession in defendant under the contract. *Campbell v. Stakes*, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561.

¹⁶² *Burnard v. Haggis*, 15 C. B. (N. S.) 45; *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519. But see *Penrose v. Curren*, 3 Rawle (Pa.) 351, 24 Am. Dec. 356.

¹⁶³ *Studwell v. Shapter*, 54 N. Y. 249; *Burdett v. Williams* (D. C.) 30 Fed. 697; *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Brown v. McCune*, 5 Sandf. (N. Y.) 228; *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87; *Norris v. Vance*, 3 Rich. Law (S. C.) 164; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *McKamy v. Cooper*, 81 Ga. 679, 8 S. E. 312. But see *Bradshaw v. Van Winkle*, 133 Ind. 134, 32 N. E. 877; *Lacy v. Pixler*, 120 Mo. 383, 25 S. W. 206; *Carolina Interstate Building & Loan Ass'n v. Black*, 119 N. C. 323, 25 S. E. 975; *New York Building Loan Banking Co. v. Fisher*, 20 Misc. Rep. 244, 45 N. Y. Supp. 795. Contra, under Kansas statute. *Dillon v. Burnham*, 43 Kan. 77, 22 Pac. 1016.

¹⁶⁴ *Fitts v. Hall*, 9 N. H. 441; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Wallace v. Morss*, 5 Hill (N. Y.) 391; *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *Manning v. Johnson*, 26 Ala. 416, 62 Am. Dec. 732; *Eckstein v. Frank*, 1 Daly (N. Y.) 334. Contra, *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. Rep. 931; *Johnson v. Pie*, 1 Sid. 258; *Slayton v. Barry*, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510. He is not liable in trover. *Slayton v. Barry*, supra.

fraud will estop him from pleading his infancy to the other's prejudice.¹⁶⁵ Mere failure to disclose his age, however, is not such fraud as will warrant equitable interference with the common-law rule.¹⁶⁶ Where an infant obtains goods by false and fraudulent representations as to his age, the better opinion is that the other party may rescind and recover them back.¹⁶⁷

We have already to some extent noticed the remedies of the adult party where an infant repudiates his contract after having received the consideration. In such a case, he no longer has a right to hold the consideration; and, if he refuses to return it, he is, according to the better opinion, guilty of a tort, for which the other party may maintain an action.¹⁶⁸

If the infant, while rightfully in possession of the consideration which he has received, has wasted or disposed of it during his minority, and he is allowed to disaffirm his contract, the other party is remediless,¹⁶⁹ unless he can trace the property into the hands of those who obtained it from the infant.

INSANE PERSONS—IN GENERAL. 1 2 71

117. As a rule, a contract entered into by an insane person, or person non compos mentis, is voidable at his option; but the rule is subject to exceptions, as follows:

EXCEPTIONS—(a) The following contracts are valid and binding:

- (1) Contracts created by law, or quasi contracts.
- (2) In most, but not all, jurisdictions, where the sane party acted fairly and in good faith, without actual or constructive knowledge of the other's insanity, and the contract has been so far executed that he cannot be placed in statu quo.

(b) The following contracts are void:

- (1) In most, but not all, jurisdictions, contracts by a person who has been judicially declared insane on inquisition, and placed under guardianship.
- (2) In a few jurisdictions, deeds; and, in most jurisdictions, powers of attorney or other appointments of an agent.

¹⁶⁵ *Ferguson v. Bobo*, 54 Miss. 121. See *Evans v. Morgan*, 69 Miss. 323, 12 South. 270; *Charles v. Hastedt*, 51 N. J. Eq. 171, 26 Atl. 564; *Thormaehlen v. Kaepfel*, 86 Wis. 378, 56 N. W. 1089.

¹⁶⁶ *Baker v. Stone*, 136 Mass. 405; *Sewell v. Sewell*, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606; *Davidson v. Young*, 38 Ill. 145; *Brantley v. Wolf*, 60 Miss. 420; *Price v. Jennings*, 62 Ind. 111.

¹⁶⁷ *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Neff v. Landis*, 110 Pa. 204, 1 Atl. 177.

¹⁶⁸ *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Mustard v. Wohlford's Heirs*, 15 Grat. (Va.) 329, 76 Am. Dec. 209; *Vasse v. Smith*, 6 Cranch, 226, 3 L. Ed. 207; *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732.

¹⁶⁹ Ante, p. 173, note 149.

Formerly it was thought that a man could not avoid a contract entered into while he was non compos mentis. It was said to be a maxim of the common law that no man of full age should be allowed by plea to stultify himself, and thereby avoid his own deed or contract.¹⁷⁰ It seems, however, that this never was the common law, and that the cases so holding were erroneous.¹⁷¹ At any rate, the doctrine has long since been exploded, and it is almost universally held that a contract made by a person who is lacking in mental capacity, unless he has been judicially declared insane, is at most voidable.¹⁷²

The incapacity may result from lunacy,¹⁷³ from idiocy,¹⁷⁴ from senile dementia,¹⁷⁵ or any other defect or disease of the mind, whatever may be its cause.¹⁷⁶ To render a person thus incapable of contracting, his infirmity need not be so great as to dethrone his reason, nor amount to entire want of reason;¹⁷⁷ but, on the other hand, it must be something more than mere weakness of intellect.¹⁷⁸ It must be such as to render the person incapable of comprehending the subject of the con-

¹⁷⁰ *Beverley's Case*, 4 Coke, 123; Co. Litt. 147; 2 Bl. Comm. 292.

¹⁷¹ *Fitzh. Nat. Brev.* 202; *Yates v. Boen*, 2 Strange, 1104; *Webster v. Woodford*, 3 Day (Conn.) 90; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431.

¹⁷² Post. p. 181.

¹⁷³ *Merritt v. Gumaer*, 2 Cow. (N. Y.) 552.

¹⁷⁴ *Burnham v. Kidwell*, 113 Ill. 425; *Ball v. Mannin*, 3 Bligh (N. S.) 1, *Ewell, Lead. Cas.* 534.

¹⁷⁵ As to weakness of intellect or imbecility from old age, see *Guild v. Hull*, 127 Ill. 523, 20 N. E. 665; *Peabody v. Kendall*, 145 Ill. 519, 32 N. E. 674; *Argo v. Coffin*, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; *Lynch v. Doran*, 95 Mich. 895, 54 N. W. 882; *King v. Cummings*, 60 Vt. 502, 11 Atl. 727; *Keeble v. Cummins*, 5 Hayw. (Tenn.) 43; *Coleman v. Frazer*, 3 Bush (Ky.) 300; *Bressey's Adm'r v. Gross* (Ky.) 7 S. W. 150; *Clark v. Kirkpatrick* (N. J. Ch.) 16 Atl. 309; *Trimbo v. Trimbo*, 47 Minn. 389, 50 N. W. 350; *Cole v. Cole*, 21 Neb. 84, 31 N. W. 493; *Crowe v. Peters*, 63 Mo. 429; *Shaw v. Ball*, 55 Iowa, 55, 7 N. W. 413; *Marshall v. Marshall*, 75 Iowa, 132, 39 N. W. 230. Old age is not of itself evidence of incapacity. *Buckey v. Buckey*, 38 W. Va. 168, 18 S. E. 383. And see cases cited above.

¹⁷⁶ See *Henderson v. McGregor*, 30 Wis. 78; *Brothers v. Bank*, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; *Somes v. Skinner*, 16 Mass. 348; *Hale v. Brown*, 11 Ala. 87; *Conant v. Jackson*, 16 Vt. 335; *Wilson v. Oldham*, 12 B. Mon. (Ky.) 55; *Johnson v. Chadwell*, 8 Humph. (Tenn.) 145. Result of habitual drunkenness: *Bliss v. Railroad Co.*, 24 Vt. 424; *Menkins v. Lightner*, 18 Ill. 282.

¹⁷⁷ *Ball v. Mannin*, 3 Bligh (N. S.) 1, *Ewell, Lead. Cas.* 534.

¹⁷⁸ *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97; *Stone v. Wilbern*, 83 Ill. 105; *Lawrence v. Willis*, 75 N. C. 471; *Simonton v. Bacon*, 49 Miss. 582; *Des Moines Nat. Bank v. Chisholm*, 71 Iowa, 675, 33 N. W. 234; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Guild v. Hull*, 127 Ill. 523, 20 N. E. 665; *Davis v. Phillips*, 85 Mich. 198, 48 N. W. 513; *White v. Farley*, 81 Ala. 563, 8 South. 215; *Maddox v. Simmons*, 31 Ga. 528; *Kimball v. Cuddy*, 117 Ill. 213, 7 N. E. 589; *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; *Cain v. Warford*, 33 Md. 23; *Cadwallader v. West*, 48 Mo. 483. The fact that a person is deaf and dumb does not alone render him incapable. See *Brower*

tract, and its nature and probable consequences.¹⁷⁹ He need not be permanently insane; it is enough if he is insane at the time he enters into the contract.¹⁸⁰ A contract made during a lucid interval is binding.¹⁸¹

Nor need the insanity be general. A person who is laboring under an insane delusion is incapable of making a binding contract if his delusion is so connected with the subject-matter of the contract as to render him incapable of comprehending its nature and probable consequences. If such was his condition, he may avoid the contract, though he may have been perfectly sane in respect of other matters, and might have been able to make a binding contract in reference to some other subject-matter.¹⁸²

Effect of Contracts.

Thus far we have spoken of the contracts of a person non compos mentis as being voidable only, and as a rule they are so; but, as in the

v. Fisher, 4 Johns. Ch. (N. Y.) 441; Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187; Barnett v. Barnett, 54 N. C. 221.

¹⁷⁹ Bishop, Cont. § 962; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Perry v. Pearson, 135 Ill. 218, 25 N. E. 636; Bond v. Bond, 7 Allen (Mass.) 1; Young v. Stevens, 48 N. H. 135, 2 Am. Rep. 202, 97 Am. Dec. 592; Musselman v. Cravens, 47 Ind. 1; Lilly v. Waggoner, 27 Ill. 396; Baldwin v. Dunton, 40 Ill. 188; Titcomb v. Vantyle, 84 Ill. 371; Worthington v. Worthington (Md.) 20 Atl. 911; Brown v. Brown, 108 Mass. 386; Crowther v. Rowlandson, 27 Cal. 381; Somers v. Pumphrey, 24 Ind. 231; Burnham v. Mitchell, 34 Wis. 136; Henderson v. McGregor, 30 Wis. 78; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Hovey v. Hobson, 55 Me. 256; Aiman v. Stout, 42 Pa. 114; Noel v. Karper, 53 Pa. 97; Dicken v. Johnson, 7 Ga. 484; Lozeau v. Shields, 23 N. J. Eq. 509; Tolson's Adm'r v. Garner, 15 Mo. 494.

¹⁸⁰ Curtis v. Brownell, 42 Mich. 165, 3 N. W. 936; Peaslee v. Robbins, 3 Metc. (Mass.) 164; Jenners v. Howard, 6 Blackf. (Ind.) 240.

¹⁸¹ Hall v. Warren, 9 Ves. 605; Lilly v. Waggoner, 27 Ill. 395; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; Smith v. Smith, 108 N. C. 365, 12 S. E. 1045, and 13 S. E. 113; Jones' Adm'r v. Perkins, 5 B. Mon. (Ky.) 222; Norman v. Trust Co., 92 Ga. 295, 18 S. E. 27; Beckwith v. Butler, 1 Wash. (Va.) 224; Carpenter v. Carpenter, 8 Bush (Ky.) 283; Staples v. Wellington, 58 Me. 453; Stewart v. Redditt, 3 Md. 81; Wright v. Market Bank (Tenn.) 60 S. W. 623. The authorities are conflicting as to whether the burden is on the other party to show that the contract was made in a lucid interval. That it is, see Fishburne v. Ferguson's Heirs, 84 Va. 87, 4 S. E. 575; Sheets v. Bray, 125 Ind. 33, 24 N. E. 357; Hall v. Warren, 9 Ves. 605. Contra, Wright v. Wright, 139 Mass. 177, 29 N. E. 380.

¹⁸² Bond v. Bond, 7 Allen (Mass.) 1; Riggs v. Tract Soc., 95 N. Y. 503; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Searle v. Galbraith, 73 Ill. 269; Alston v. Boyd, 6 Humph. (Tenn.) 504; Samuel v. Marshall, 3 Leigh (Va.) 567; Dominick v. Randolph, 124 Ala. 557, 27 South. 481. Monomania on the subject of religion or spiritualism. Boyce's Adm'r v. Smith, 9 Grat. (Va.) 704, 60 Am. Dec. 313; Lewis v. Arbuckle, 85 Iowa 335, 52 N. W. 237, 16 L. R. A. 677; West v. Russell, 48 Mich. 74, 11 N. W. 812; Burgess v. Pollock, 53 Iowa, 273, 5 N. W. 179, 36 Am. Rep. 218.

case of infants, some of his contracts are valid, and some of them are held to be absolutely void. In some jurisdictions the contract is held binding where the other party acted in good faith, and without knowledge of the insanity. Of this we will presently speak at some length.

Same—Quasi Contracts.

As in the case of infancy, the rule that a person may avoid a contract made while he was insane does not apply to so called contracts created by law, or quasi contracts, for here the obligation is imposed by law without regard to the consent of the party bound.¹⁸³

Same—Contracts for Necessaries.

Nor does the rule apply to the contracts of a person non compos mentis for necessaries furnished to himself or to his wife, or, in some jurisdictions, to his children.¹⁸⁴ The rules on this subject are substantially the same as in the case of an infant's necessaries; except, it seems, that, unlike an infant, a person non compos mentis is liable for labor and materials furnished for the preservation of his estate, where they were necessary for its preservation.¹⁸⁵ In all cases the credit must have been given to the insane person, and not to some third person.¹⁸⁶ The fact that the person has been judicially declared insane, and placed under guardianship, does not prevent his liability for necessaries.¹⁸⁷

Same—Void and Voidable.

It has been held by some courts that the deed of an insane person,¹⁸⁸ or a power of attorney or other appointment of an agent,¹⁸⁹

¹⁸³ Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13. Post, p. 547.

¹⁸⁴ La Rue v. Gilkyson, 4 Pa. 375, 45 Am. Dec. 700; Richardson v. Strong, 35 N. C. 106, 55 Am. Dec. 430; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; Baxter v. Portsmouth, 5 Barn. & C. 170; Van Horn v. Hann, 39 N. J. Law, 207; Read v. Legard, 6 Exch. 636; Surles v. Pipkin, 69 N. C. 513; Shaw v. Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; Sawyer v. Lufkin, 56 Me. 308; Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Kendall v. May, 10 Allen (Mass.) 59; Rhodes v. Rhodes, 44 Ch. Div. 94; SCEVA v. TRUE, 53 N. H. 627. Liability for necessaries furnished his wife. Read v. Legard, supra. He has even been held liable for luxuries furnished in good faith. Kendall v. May, supra.

¹⁸⁵ Williams v. Wentworth, 5 Beav. 325.

¹⁸⁶ Bish. Cont. § 968; Massachusetts Hospital v. Fairbanks, 129 Mass. 78, 37 Am. Rep. 303; Id., 132 Mass. 414.

¹⁸⁷ McCrillis v. Bartlett, 8 N. H. 569; Sawyer v. Lufkin, 56 Me. 308; Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13; Baxter v. Portsmouth, 5 Barn. & C. 170; Fruitt v. Anderson, 12 Ill. App. 421.

¹⁸⁸ Van Deusen v. Sweet, 51 N. Y. 378 (but see Ingraham v. Baldwin, 9 N. Y. 45); Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512; In re Estate of

¹⁸⁹ Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73. And see Marvin v. Inglis, 39 How. Prac. (N. Y.) 329; Plaster v. Rigney, 97 Fed. 12, 38 C. C. A. 25; McClun v. McClun, 176 Ill. 376, 52 N. E. 928. But see Williams v. Sopheha, 94 Tex. 430, 61 S. W. 115; Tiffany, Ag. 98.

is absolutely void. In most jurisdictions, however, no distinction is made in this respect between the deed of an insane person and that of an infant. It is held to be voidable, and not void.¹⁹⁰ As an almost universal rule, all his contracts other than valid ones are not void, but simply voidable at his option;¹⁹¹ and they are binding on the other party if he elects to hold him.¹⁹²

Inquisition and Adjudication of Lunacy.

In most jurisdictions it is held—in some, however, by reason of express statutory provisions—that if a person has been judicially determined to be insane, and placed under guardianship, the decree and letters of guardianship take from him all capacity to contract, and that his contracts while under guardianship are absolutely void.¹⁹³ In other jurisdictions the fact that he has been adjudged insane, and placed under guardianship, only raises a presumption of incapacity to contract, which may be rebutted; but the presumption is very strong, and the proof of capacity must be clear.¹⁹⁴

Desilver, 5 Rawle (Pa.) 111, 28 Am. Dec. 645; Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504; Goodyear v. Adams, 52 Hun. 612, 5 N. Y. Supp. 275; Brown v. Miles, 61 Hun. 453, 16 N. Y. Supp. 251; Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175; Thompson v. Leach, 3 Salk. 300; Edwards v. Davenport (C. C.) 20 Fed. 756.

¹⁹⁰ Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Wait v. Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; Gibson v. Soper, 6 Gray (Mass.) 279, 63 Am. Dec. 414; Arnold v. Iron Works, 1 Gray (Mass.) 434; Allis v. Billings, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; Evans v. Horan, 52 Md. 602; Burnham v. Kidwell, 113 Ill. 425; Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 716; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 245, 19 Am. Dec. 71; Allen v. Berryhill, 27 Iowa, 534, 1 Am. Rep. 309; French Lumbering Co. v. Theriault, 107 Wis. 627, 83 N. W. 927, 51 L. R. A. 910, 81 Am. St. Rep. 856.

¹⁹¹ Eaton v. Eaton, 37 N. J. Law, 108, 18 Am. Rep. 716; Carrier v. Sears, 4 Allen (Mass.) 326; Burnham v. Kidwell, 113 Ill. 425; Arnold v. Iron Works, 1 Gray (Mass.) 434; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Riley v. Carter, 76 Md. 581, 25 Atl. 667, 19 L. R. A. 489, 35 Am. St. Rep. 443; Ætna Life Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97, 77 Am. St. Rep. 481.

¹⁹² Harmon v. Harmon (C. C.) 51 Fed. 113; Allen v. Berryhill, 27 Iowa, 534, 1 Am. Rep. 309.

¹⁹³ Wait v. Maxwell, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; Leonard v. Leonard, 14 Pick. (Mass.) 280; Rannels v. Gerner, 80 Mo. 474; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235; Bradbury v. Place (Me.) 10 Atl. 461; Mohr v. Tulip, 40 Wis. 66; Griswold v. Butler, 3 Conn. 227. Where the guardian was discharged as being an unsuitable person, and no other guardian was appointed, the decree adjudging the ward insane was not conclusive as to his incapacity after the guardian's discharge. Willwerth v. Leonard, 156 Mass. 277, 31 N. E. 299. The rule, it has been held, does not apply to statutory proceedings merely to determine whether a person is insane for the purpose of committing him to a hospital for the insane. Knox v. Haug, 48 Minn. 58, 50 N. W. 934.

¹⁹⁴ As to this, see Mott v. Mott, 49 N. J. Eq. 192, 22 Atl. 997; Hart v. Deamer, 6 Wend. (N. Y.) 497; Parker v. Davis, 53 N. C. 460; Hopson v. Boyd,

Ignorance and Good Faith of the Other Party.

In some states it is held that the contract of an insane person may be avoided by him, though it is fair and reasonable, and though it was entered into by the other party in perfect good faith, and in ignorance of his infirmity.¹⁹⁵ "The fairness of the defendant's conduct," it was said in a leading Massachusetts case, "cannot supply the plaintiff's want of capacity."¹⁹⁶

The weight of authority, however, in this country is in favor of the doctrine that, if the sane party did not know, or have reasonable cause to know, of the other's insanity, and acted in good faith, and the contract was fair, and has been so far executed that the parties cannot be placed in statu quo, it cannot be avoided. In *Molton v. Camroux*, a leading English case, a lunatic had purchased annuities of a society, paid the money, and died, whereupon his administratrix sued the society to recover back the money on the ground that the contract was void. The jury found that at the time of the contract the deceased was insane, but that there was nothing to indicate this to the defendant, and that the transaction was in good faith. It was held that the money could not be recovered. "The modern cases show," it was said, "that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory, but executed in whole or in part, and the parties cannot be restored to their original position."¹⁹⁷ This case has been expressly followed and applied in a number of our courts, while others, though not citing it, have laid down the same doctrine.¹⁹⁸

6 B. Mon. (Ky.) 296; *Snook v. Watts*, 11 Beav. 105; *In re Gangwere's Estate*, 14 Pa. 417, 53 Am. Dec. 554; *Topeka Water Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 715; *Lower v. Schumacher*, 61 Kan. 625, 60 Pac. 538.

¹⁹⁵ *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Gibson v. So-per*, 6 Gray, 279, 66 Am. Dec. 414; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Fitzgerald v. Reed*, 9 Smedes & M. (Miss.) 94; *Sullivan v. Flynn*, 20 D. C. 396; *Brigham v. Fayerweather*, 144 Mass. 52, 10 N. E. 735; *Orr v. Mortgage Co.*, 107 Ga. 499, 33 S. E. 708; *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937.

¹⁹⁶ *Seaver v. Phelps*, supra.

¹⁹⁷ *Molton v. Camroux*, 2 Exch. 489, 4 Exch. 17.

¹⁹⁸ *Eaton v. Eaton*, 37 N. J. Law, 108, 18 Am. Rep. 716; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Ingraham v. Baldwin*, 9 N. Y. 45; *Boyer v. Berryman*, 123 Ind. 451, 24 N. E. 249; *Lincoln v. Buckmaster*, 32 Vt. 652; *Young v. Stevens*, 48 N. H. 136, 2 Am. Rep. 202, 97 Am. Dec. 592; *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911; *GRIBBEN v. MAXWELL*, 34 Kan. 8; *Abbott v. Creal*, 56 Iowa, 175, 9 N. W. 115; *Shoulters v. Allen*, 51 Mich. 529, 16 N. W. 888; *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536; *Burnham v. Kidwell*, 113 Ill. 425; *Scanlon v. Cobb*, 85 Ill. 296; *Northwestern Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185; *McCormick v. Littler*, 85 Ill. 62, 28 Am. Rep. 610; *Beals v. See*, 10 Pa. 56, 49 Am. Dec. 573; *Riggan v. Green*, 80 N. C. 236, 30 Am. Rep. 77; *Myers v. Knabe*, 51

The distinctions between executory and executed contracts however, suggested in *Molton v. Camroux*, appear to have been repudiated in England, and in that country the more recent rule appears to be that the contract of a lunatic is binding unless the other party knew of his condition.¹⁹⁹

The doctrine thus stated, however, is not to be applied as a technical rule in all cases. "The cases will disclose," it has been said, "that one dealing with an insane person, and not knowing his condition, or any facts to put him on his guard, will be protected by the courts of law and equity against such person's repudiating his contract on the ground of his mental incapacity. But the rule is not a technical one, to be relied on at all times and under all circumstances. It is applied in each case only to prevent a wrong being done, and is based on the principle that 'the law will not permit the lunatic's infirmity to be made an instrument of fraud.'" ²⁰⁰

SAME—RATIFICATION AND AVOIDANCE.

- 118. The voidable contract of a person non compos mentis may be ratified or avoided by himself when sane, or by his guardian during insanity, or by his representatives or heirs after his death.**
- 119. The right to disaffirm is personal, and neither the other party nor third persons can avoid it.**
- 120. In a few jurisdictions, although the other party did not know of the insanity and the contract was fair, the consideration received by the insane person need not be returned as a condition precedent to avoidance if he is unable to return it.**
- 121. The contract can be avoided as against bona fide purchasers.**

The voidable contracts of a person non compos mentis may be ratified or disaffirmed by him when he becomes sane, or during a lucid interval;²⁰¹ or, during the continuance of his infirmity, by his committee or guardian;²⁰² or, after his death, by his personal representa-

Kan. 720, 33 Pac. 602; *Harrison v. Otley*, 101 Iowa, 652, 70 N. W. 724; *Flach v. Gottschalk Co.*, 88 Md. 368, 41 Atl. 908, 42 L. R. A. 745, 71 Am. St. Rep. 418; *McKenzie v. Donnell*, 151 Mo. 431, 52 S. W. 214; *Jamison v. Culligan*, 151 Mo. 410, 52 S. W. 224. If, however, the lunatic has received no benefit under the contract, it has been said that he can recover what he has parted with, notwithstanding the other party's good faith. *Lincoln v. Buckmaster*, 32 Vt. 658; *Van Patton v. Beals*, 46 Iowa, 63.

¹⁹⁹ *IMPERIAL LOAN CO. v. STONE* [1892] 1 Q. B. 599. See *Anson*, Cont. (8th Ed.) 120.

²⁰⁰ *Knowlton's Anson*, Cont. 116, note.

²⁰¹ *Allis v. Billings*, 6 Mete. (Mass.) 416, 39 Am. Dec. 744; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *Arnold v. Iron Works*, 1 Gray (Mass.) 434; *Turner v. Rusk*, 53 Md. 65.

²⁰² *Moore v. Hershey*, 9 Norris (Pa.) 196; *Halley v. Troester*, 72 Mo. 73; *McClain v. Davis*, 77 Ind. 419.

tive,²⁰³ or his heirs.²⁰⁴ The privilege is personal to the insane person, or those who thus represent him; and neither the other party to the contract nor third persons can avoid it.²⁰⁵ Ratification or disaffirmance need not be in express words, but may be by conduct, as in the case of ratification or disaffirmance by a person of a contract made during infancy.²⁰⁶

Return of Consideration on Avoidance.

In those jurisdictions where an insane person's contract is voidable, whether it is executed or not, and whether or not the other party acted in good faith and in ignorance of his infirmity, a person is not required to restore, or offer to restore, the consideration received by him as a condition precedent to the avoidance of a contract made by him while insane. "If the law required restoration of the price as a condition precedent to the recovery of the estate, that would be done indirectly which the law does not permit to be done directly, and the great purpose of the law in avoiding such contracts—the protection of those who cannot protect themselves—defeated."²⁰⁷

As we have already seen, however, most courts do not allow an insane person to avoid his contracts where the other party acted in good faith, and in ignorance of his insanity, and cannot be placed in statu quo. Where this doctrine prevails, if the contract was made in good faith and without knowledge of the insanity, the right to avoid is conditional on return of the consideration.²⁰⁸

Avoidance as against Third Persons.

The fact that third persons have acquired an interest under the contract of a person non compos mentis, in good faith, for value, and without notice of his infirmity, cannot defeat his right to avoid the

²⁰³ *Beverley's Case*, 4 Coke, 123b; *Campbell v. Kuhn*, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Schuff v. Ransom*, 79 Ind. 458; *Orr v. Mortgage Co.*, 107 Ga. 499, 33 S. E. 708.

²⁰⁴ *Allis v. Billings*, 6 Metc. (Mass.) 415, 39 Am. Dec. 744; *Schuff v. Ransom*, 79 Ind. 458.

²⁰⁵ *Carrier v. Sears*, 4 Allen (Mass.) 336, 81 Am. Dec. 707; *Allen v. Berryhill*, 27 Iowa, 534, 1 Am. Rep. 309; ante, p. 162. Contra, *Burke v. Allen*, 29 N. H. 106, 61 Am. Dec. 642. Sureties are liable on a note executed by an insane person. *Lee v. Yandell*, 69 Tex. 34, 6 S. W. 665. Only privies in blood or legal representatives can avoid. *Hunt v. Rabitoay*, 125 Mich. 137, 84 N. W. 59, 84 Am. St. Rep. 563.

²⁰⁶ *Gibson v. Soper*, 6 Gray (Mass.) 283, 66 Am. Dec. 414; *Arnold v. Iron Works*, 1 Gray (Mass.) 434; *Whitcomb v. Hardy*, 73 Minn. 285, 76 N. W. 29. Cf. *Beasley v. Beasley*, 180 Ill. 163, 54 N. E. 187. Disaffirmance by action to avoid. *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; *Ashmead v. Reynolds*, 127 Ind. 441, 26 N. E. 80.

²⁰⁷ *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414. See, also, *Hovey v. Hobson*, 53 Me. 453, 89 Am. Dec. 705.

²⁰⁸ Cases cited *supra*, note 183.

contract.²⁰⁹ This rule applies to deeds²¹⁰ and negotiable instruments²¹¹ as well as to other contracts, and it applies whether the contract be regarded as void or merely voidable. To protect bona fide purchasers in such cases would be to withdraw protection from the insane person.

DRUNKEN PERSONS.

122. A contract made by a person while he is so drunk as to be incapable of understanding its nature and effect is voidable at his option, except that—

EXCEPTIONS—He is liable on contracts created by law, or quasi contracts.

123. The rules as to ratification and avoidance are substantially the same as in the case of infants and insane persons, except that some (but not all) courts hold that the contract cannot be avoided as against a bona fide purchaser.

The modern law places a drunken person, in respect of his capacity to contract, in the same position as an insane person. If his drunkenness is so excessive as to render him incapable of comprehending the nature and effect of his contract, it is voidable at his option, and it is immaterial that his drunkenness was voluntary, and not procured through the circumvention of the other party.²¹² In the absence of fraud, slight intoxication does not affect the validity of a contract. It

²⁰⁹ Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Hull v. Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405; Long v. Fox, 100 Ill. 43; Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512.

²¹⁰ Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512. In North Carolina it is held that the deed of a lunatic, duly recorded, cannot be avoided as against bona fide purchasers. Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686.

²¹¹ Sentance v. Pool, 3 C. & P. 1; Anglo-Californian Bank v. Ames (C. C.) 27 Fed. 727; Wirebach's Ex'r v. Bank, 97 Pa. 543, 39 Am. Rep. 821; McClain v. Davis, 77 Ind. 419.

²¹² BARRETT v. BUNTON, 2 Aikens (Vt.) 167, 16 Am. Dec. 691; Carpenter v. Rodgers, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; Miller v. Finley, 26 Mich. 254, 12 Am. Rep. 306; Gore v. Gibson, 13 Mees. & W. 623; Coulkins v. Fry, 35 Conn. 170; Johns v. Fritchey, 39 Md. 258; Bush v. Breinig, 113 Pa. 310, 6 Atl. 86, 57 Am. Rep. 469; Foss v. Hildreth, 10 Allen (Mass.) 76; Matthews v. Baxter, L. R. 8 Exch. 132; Shackelton v. Sebree, 86 Ill. 616; Bates v. Ball, 72 Ill. 108; Mansfield v. Watson, 2 Iowa, 111; Warnock v. Campbell, 25 N. J. Eq. 485; French's Heirs v. French, 8 Ohio, 214, 31 Am. Dec. 441; Cummings v. Henry, 10 Ind. 109; Reynolds v. Waller's Heirs, 1 Wash. (Va.) 164; Newell v. Fisher, 11 Smedes & M. (Miss.) 431; Broadwater v. Darne, 10 Mo. 277; Phelan v. Gardner, 43 Cal. 306. But see Reinskopf v. Rogge, 37 Ind. 207. In Hunter v. Tolbard, 47 W. Va. 258, 34 S. E. 737, it is held that the contract is void. It has been held that a person who, when so-

must be so excessive as to render him incapable of knowing what he is doing.²¹³ The contract, though voidable at the option of the drunken person, is binding on the other party, and cannot be attacked by third persons.²¹⁴ By the weight of authority, if a person has been judicially declared incapable of conducting his own affairs by reason of habitual drunkenness, and has been put in the custody and under the control of a committee or guardian, his contracts are absolutely void.²¹⁵

A person who was drunk, but not under guardianship, when he entered into a contract, may either avoid or ratify it when sober;²¹⁶ and ratification or disaffirmance may be by conduct showing an intention to ratify or to avoid it, as by retention of the consideration, after becoming sober, or failure to disaffirm for an unreasonable time.²¹⁷ Having ratified the contract, he cannot retract and avoid it.²¹⁸ On avoidance he must return or offer to return the consideration received by him,²¹⁹ though, if the consideration were wasted before becoming sober, this would probably not be required.²²⁰

A drunken person is liable on contracts created by law, or quasi contracts, and is liable for necessities furnished him.²²¹

As to whether drunkenness is a defense against persons in good faith acquiring rights for value under the contract,—as, for instance, against the bona fide holder of a negotiable instrument,—the authori-

ber, agrees to sign a contract, cannot avail himself of intoxication at the time of signature as a defense. *Page v. Krekey*, 63 Hun, 629, 17 N. Y. Supp. 764. Cf. *Youn v. Lamont*, 56 Minn. 216, 57 N. W. 478.

²¹³ *Van Wyck v. Brasher*, 81 N. Y. 260; *Conley v. Nailor*, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; *Willcox v. Jackson*, 51 Iowa, 208, 1 N. W. 513; *Van Horn v. Keenan*, 28 Ill. 445; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Wright v. Waller*, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440. And see cases cited in preceding note.

²¹⁴ *Matthews v. Baxter*, L. R. 8 Exch. 132; *Eaton's Adm'r v. Perry*, 29 Mo. 96.

²¹⁵ *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499. Contra, *Appeal of Donehoe* (Pa. Sup.) 15 Atl. 924. This is true even of a negotiable instrument in the hands of a bona fide purchaser for value. *Wadsworth v. Sharpsteen*, supra. This does not apply to contracts for necessities. *McCrillis v. Bartlett*, 8 N. H. 569.

²¹⁶ See cases cited in note 212, supra. It may be avoided by his personal representatives. *Wigglesworth v. Steers*, 1 Hen. & M. (Va.) 70, 3 Am. Dec. 602.

²¹⁷ *Williams v. Inabet*, 1 Bailey (S. C.) 343; *Reinskopf v. Rogge*, 37 Ind. 207; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753; *Mansfield v. Watson*, 2 Iowa, 111.

²¹⁸ *Matthews v. Baxter*, L. R. 8 Exch. 132; *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377.

²¹⁹ *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377.

²²⁰ *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486.

²²¹ *Gore v. Gibson*, 13 Mees. & W. 623; *McCrillis v. Bartlett*, 8 N. H. 569.

ties are conflicting. Some courts hold that total, but not partial, drunkenness, is a defense; while others hold that not even total drunkenness is a defense.²²³

MARRIED WOMEN.

124. At common law, as a rule, a married woman, during coverture, is incapable of contracting, and can incur no contractual obligation.

EXCEPTIONS AT COMMON LAW—(a) If the husband is civilly dead.

(b) If the husband has deserted his wife, and left the state.

EXCEPTIONS IN EQUITY—(c) In equity a married woman may have a separate estate, and contract in reference thereto as a feme sole.

EXCEPTIONS BY STATUTE—(d) In most jurisdictions, the common-law disabilities of married women have been virtually removed by statute.

At common law, as a rule, a married woman is without capacity to enter into a valid contract. Her contracts are absolutely void.²²³ It makes no difference whether she is living with her husband or not.²²⁴ An agreement of separation, for instance, by which the husband has secured to his wife a separate maintenance, it is said, cannot change their legal relationship so as to render her liable on her contracts; ²²⁵ nor can the fact that a wife has deserted her husband, and is living in adultery, render her liable.²²⁶ Even a divorce a mensa et thoro does

²²² *State Bank v. McCoy*, 69 Pa. 204, 8 Am. Rep. 246; *McSparran v. Neeley*, 91 Pa. 17; *Smith v. Williamson*, 8 Utah, 219, 30 Pac. 753. See Norton, *Bills & N.* (3d Ed.) 232.

²²³ *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; *Smith v. Plomer*, 15 East, 607; *Manby v. Scott*, 2 Smith, Lead. Cas. 375; *Mackinley v. McGregor*, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; *Tracy v. Keith*, 11 Allen (Mass.) 214; *Morris v. Norfolk*, 1 Taunt. 212; *Musick v. Dodson*, 76 Mo. 624, 43 Am. Rep. 780; *Dobbin v. Hubbard*, 17 Ark. 189, 65 Am. Dec. 425; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; *Hollis v. Francois*, 5 Tex. 195, 51 Am. Dec. 760; *Stevens v. Parish*, 29 Ind. 260, 95 Am. Dec. 636; *Burton v. Marshall*, 4 Gill (Md.) 487, 45 Am. Dec. 171; *HAYWARD v. BARKER*, 52 Vt. 429, 36 Am. Rep. 762; *Porterfield v. Butler*, 47 Miss. 165, 12 Am. Rep. 329; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592; *Pond v. Carpenter*, 12 Minn. 430 (Gil. 315); *Farrar v. Bessey*, 24 Vt. 89; *Howe v. Wildes*, 34 Me. 566; *Young v. Paul*, 10 N. J. Eq. 404, 64 Am. Dec. 456; *Tucker v. Cocke*, 32 Miss. 184; *Thompson v. Warren*, 8 B. Mon. (Ky.) 488. And see cases cited in *Ewell*, Lead. Cas. 312.

²²⁴ *Harris v. Taylor*, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576. Contra: *Love v. Moynahan*, 16 Ill. 277, 63 Am. Dec. 306.

²²⁵ *Marshall v. Rutton*, 8 Term R. 545.

²²⁶ *MEYER v. HAWORTH*, 8 Adol. & E. 467.

not give a woman power to bind herself by contract at common law,²²⁷ though this is very generally changed by statute.

As a rule, a married woman is liable for her torts, including her frauds, and may be sued in respect of such acts, jointly with her husband, or separately if she survives him; but, as in the case of infants, she cannot even be sued for her fraud where it is directly connected with her contract, and is part of the same transaction, though it is otherwise if the fraud is not connected with her contract.²²⁸ False representations by a married woman that she is unmarried, or a widow, to induce a person to contract with her, will not estop her from pleading her coverture when sued upon the contract, though, like an infant under similar circumstances, she would no doubt be liable in an action for deceit.²²⁹

Exceptions—At Common Law.

At common law a married woman may acquire contractual rights by reason of personal services rendered by her, or by reason of the assignment or execution to her of a chose in action, such as a bond or note.²³⁰ The husband may reduce to his possession the rights so accruing to his wife; but, unless he does this by some act indicating an intention to deal with them as his own, they do not pass, like other personalty of the wife, into the estate of the husband, but survive to the wife if she outlives him, or pass to her personal representatives if she dies in his lifetime.

The wife of a man who was civilly dead by reason of his being under conviction of a felony had the same capacity to contract as a feme sole.²³¹ The old common-law doctrine of civil death from conviction of a felony, however, is not recognized in this country; but there are, in some states, statutes declaring that a man who is under a sentence of imprisonment in the penitentiary for life shall be deemed civilly dead.

²²⁷ *Faithorne v. Blaquiere*, 6 Maule & S. 73; *Lewis v. Lee*, 3 Barn. & C. 291. Contra, *Dean v. Richmond*, 5 Pick. (Mass.) 461; *Pierce v. Burnham*, 4 Metc. (Mass.) 303.

²²⁸ *Leake*, Cont. 235; *Liverpool Adelphi Loan Ass'n v. Fairhurst*, 9 Exch. 422; *Wright v. Leonard*, 11 C. B. (N. S.) 258.

²²⁹ *Cannam v. Farmer*, 3 Exch. 698; *Liverpool Adelphi Loan Ass'n v. Fairhurst*, 9 Exch. 422; *Wright v. Leonard*, 11 C. B. (N. S.) 258.

²³⁰ *Stevens v. Beals*, 10 Cush. (Mass.) 291, 57 Am. Dec. 108; *Cobb v. Duke*, 36 Miss. 60, 72 Am. Dec. 157.

²³¹ Co. Litt. 132b; *Hatchett v. Baddeley*, 2 W. Bl. 1079, 1082; *Carrol v. Blencow*, 4 Esp. 27. Civil death arose formerly in England also from outlawry. As to other exceptions not material in this country, see *Anson. Cont.* (8th Ed.) 122; *Pollock, Cont.* (3d Ed.) 80. As to agreements of separation, see *Tiffany, Pers. & Dom. Rel.* 168.

Where, however, a husband deserts his wife absolutely and completely, and leaves the state, it is generally held in this country that the wife may contract and sue and be sued as a feme sole.²³²

Same—In Equity.

In equity a married woman may have property settled upon her to her separate use, in which case she may dispose of it in the same manner as if she were a feme sole. In the exercise of this right, she may charge it with the liability to satisfy contracts made by her; and an engagement or security entered into by her, showing an intention to charge her separate property, will have that effect.²³³ As said in an English case: "Courts of equity have, through the medium of trusts, created for married women rights and interests in property, both real and personal, separate and independent of their husbands. To the extent of the rights and interests thus created a married woman has, in courts of equity, power to alienate, to contract, to enjoy. She is considered a feme sole in respect of property thus settled or secured to her separate use."²³⁴ It is presumed in general that a contract or engagement made by a married woman in writing imports an intention to charge her separate estate, otherwise the writing would have no meaning. If not in writing, it must be proved that the engagement was entered into with such an intention.²³⁵ Under this rule, bonds, bills of exchange, and promissory notes of a married woman are presumptively payable out of her separate estate.²³⁶ It is very generally

²³² Gregory v. Pierce, 4 Metc. (Mass.) 478; Mead v. Hughes' Adm'r, 15 Ala. 141, 1 Am. Rep. 123; Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Cheek v. Bellows, 17 Tex. 613, 67 Am. Dec. 686. See Rogers v. Phillips, 8 Ark. 366, 47 Am. Dec. 727. See Metc. Cont. 98 et seq. A married woman whose husband is an alien, and has never been in the United States, is liable on her contracts. Levi v. Marsha, 122 N. C. 565, 29 S. E. 832.

²³³ See Hulme v. Tenant, 1 Brown, Ch. 16; Shattock v. Shattock, L. R. 2 Eq. 182; Jaques v. Methodist Church, 17 Johns. (N. Y.) 549, 8 Am. Dec. 447; Martin v. Dwelly, 6 Wend. (N. Y.) 9, 21 Am. Dec. 245; Hollis v. Francois, 5 Tex. 195; Bradford v. Greenway, 17 Ala. 797, 52 Am. Dec. 203; Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425; Rogers v. Ward, 8 Allen (Mass.) 387, 85 Am. Dec. 710; Smith v. Thompson, 2 MacArthur (D. C.) 291; Priest v. Cone, 51 Vt. 495, 31 Am. Rep. 695; Willard v. Eastham, 15 Gray (Mass.) 328, 79 Am. Dec. 366; Johnson v. Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142; Burch v. Breckenridge, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; Kantrowitz v. Prather, 31 Ind. 92, 99 Am. Dec. 587; Phillips v. Graves, 20 Ohio St. 371, 5 Am. Rep. 675; Baker v. Gregory, 28 Ala. 544, 65 Am. Dec. 366. See Tiffany, Pers. & Dom. Rel. 131 et seq.

²³⁴ Johnson v. Gallagher, 3 De Gex, F. & J. 494.

²³⁵ Leake, Cont. 238; Kantrowitz v. Prather, 31 Ind. 92, 99 Am. Dec. 587; Burch v. Breckenridge, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; Litton v. Baldwin, 8 Humph. (Tenn.) 209, 47 Am. Dec. 605; Johnson v. Cummins, 16 N. J. Eq. 97, 84 Am. Dec. 142.

²³⁶ Tullett v. Armstrong, 4 Beav. 319; Phillips v. Graves, 20 Ohio St. 371,

held that, where a debt contracted by a married woman is for the benefit of her separate estate, it will be chargeable in equity for the payment thereof, without regard to her intention.²³⁷

There are some limitations on the power of a married woman in respect to her separate property which should be noticed. She cannot sue or be sued alone in respect of the separate estate. She does not acquire a sort of equitable status of capacity to contract debts in respect of her separate estate, without regard to when it is acquired. She can only bind such separate estate as is in her possession or control at the time the liabilities accrue. She cannot bind herself nor create liabilities in excess of her estate. Her creditor's remedy is not against her, but against her property.²³⁸

Same—Disability Removed by Statute.

The common law has of late years been almost universally changed by statutes both in this country and in England. The statutes vary so much in the different states that it would be impracticable to attempt to state the law.

CORPORATIONS.

125. A corporation, by reason of its artificial nature, can only contract through a duly-authorized agent.
126. Formerly, with certain exceptions, it could only contract under its corporate seal; but now, unless restricted by its charter or by statute, it may contract in the same manner as a natural person.
127. The power of a corporation to enter into a contract is limited in respect of the subject-matter only by its charter or act of incorporation or by other statutes binding on it. Except as so restricted, it has the implied power to enter into any contract which is reasonably incidental to the accomplishment of the objects for which it is created.

5 Am. Rep. 675; *Burch v. Breckenridge*, 16 B. Mon. (Ky.) 482, 63 Am. Dec. 553; *Dobbin v. Hubbard*, 17 Ark. 189, 65 Am. Dec. 425; *Rogers v. Ward*, 8 Allen (Mass.) 387, 85 Am. Dec. 710.

²³⁷ *Willard v. Eastham*, 15 Gray (Mass.) 328, 79 Am. Dec. 366; *Rogers v. Ward*, 8 Allen (Mass.) 387, 85 Am. Dec. 710; *James v. Mayrant*, 4 Desaus. Eq. (S. C.) 591, 6 Am. Dec. 630; *Yale v. Dederer*, 22 N. Y. 450, 78 Am. Dec. 216; *Johnson v. Cummins*, 16 N. J. Eq. 97, 84 Am. Dec. 142; *Dyett v. Coal Co.*, 20 Wend. (N. Y.) 570, 32 Am. Dec. 598; *Dale v. Robinson*, 51 Vt. 20, 31 Am. Rep. 669; *Patrick v. Littell*, 36 Ohio St. 79, 38 Am. Rep. 552; *McCormick v. Holbrook*, 22 Iowa, 487, 92 Am. Dec. 400. Liability for medical attendance and funeral expenses. *McClellan v. Filson*, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814.

²³⁸ *Pigard v. Hire*, 5 Ch. App. 277.

- 128. An attempted contract, which is not within the powers of a corporation, is said to be ultra vires, and in many jurisdictions is held to be void, so that it cannot be enforced; but in other jurisdictions the defense of ultra vires is excluded when the contract has been performed by the party seeking to enforce it, and it would be inequitable to allow the defense.**

A corporation can contract only by means of an agent. It "cannot act in its own person, for it has no person."²³⁹ It cannot act through one or any number of its members, merely as such, for, though they compose the corporation, they are not the corporation. It must act through an agent expressly authorized to act for it.²⁴⁰

Mode of Contracting—Seal.

It was formerly the rule, subject to some exceptions, that a corporation could manifest its intention and act only by the use of its corporate seal;²⁴¹ but this doctrine is no longer recognized in this country. Unless the charter or act of incorporation or some statute provides otherwise, it need only use a seal where an individual would be required to use one. In all cases where it is not expressly so restricted, it may, like a natural person, contract under seal, or by writing not under seal, or orally.²⁴² Like a natural person, also, it can ratify any contract made by an agent which it could have authorized the agent to make,²⁴³ and it may be liable on contracts implied as a fact from corporate acts,²⁴⁴ and on quasi contractual obligations.²⁴⁵

If the charter or act of incorporation, or any other statute, expressly prescribes a certain mode or form for entering into contracts, as is frequently the case, that form and mode must be strictly followed.²⁴⁶

²³⁹ Per Lord Cairns, in *Ferguson v. Wilson*, 2 Ch. 99.

²⁴⁰ Anonymous, 12 Mod. 423; *Bank of Ireland v. Evans Charities*, 5 H. L. Cas. 389.

²⁴¹ 1 Bl. Comm. 475; *Church v. Gas Co.*, 6 Adol. & E. 846.

²⁴² *Bank of Columbia v. Patterson*, 7 Cranch, 299, 3 L. Ed. 351; *Bank of the United States v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Topping v. Bickford*, 4 Allen (Mass.) 120; *Goodwin v. Screw Co.*, 34 N. H. 378; *Pixley v. Railroad Co.*, 33 Cal. 183, 91 Am. Dec. 623; *Regents of University of Michigan v. Society*, 12 Mich. 138; *Board of Education of Illinois v. Greenbaum*, 39 Ill. 609; *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; *Trustees of Christian Church of Wolcott v. Johnson*, 53 Ind. 273; *Clark, Corp.* 156.

²⁴³ *Peterson v. Mayor, etc.*, 17 N. Y. 450.

²⁴⁴ *Proprietors of the Canal Bridge v. Gordon*, 1 Pick. (Mass.) 297, 11 Am. Dec. 170; *Bank of Columbia v. Patterson*, 7 Cranch, 299, 3 L. Ed. 351.

²⁴⁵ *Bank of Columbia v. Patterson*, 7 Cranch, 299, 3 L. Ed. 351; *Hall v. Mayor of Swansea*, 5 Q. B. 526; *Jefferys v. Gurr*, 2 Barn. & Adol. 833; *Seagraves v. City of Alton*, 13 Ill. 366; *Trustees of Cincinnati Tp. v. Ogden*, 5 Ohio, 23.

²⁴⁶ *Head v. Insurance Co.*, 2 Cranch, 127, at page 169, 2 L. Ed. 229; *Bissell v. Spring Valley Tp.*, 110 U. S. 162, 3 Sup. Ct. 555, 28 L. Ed. 105.

The statutory provision, however, must be mandatory, and not merely directory.²⁴⁷

What Contracts are Authorized.

The power of a corporation to enter into contracts is limited, in respect of the matter of the contract, by the charter or act of incorporation, and by other statutes binding upon it. Being a creature of the legislature, it may make only such contracts as are expressly or impliedly authorized by the legislature. It exists for no other purpose, and has no greater powers, than are conferred by its creation.

By implication a corporation is given power, in the absence of express restriction in its charter, to enter into any contract which is necessary and usual in the course of business, or reasonably incident to the accomplishment of the objects for which it was created.²⁴⁸

To borrow money for carrying on its business, and to give a mortgage to secure its debts, to receive or give negotiable paper, to buy and sell land, are all acts within the power of the corporation if it is acting within its proper sphere, and in carrying out the purposes for which it was incorporated; but not otherwise.²⁴⁹

Ultra Vires Contracts.

A contract made by a corporation *ultra vires*—that is, beyond the powers of the corporation executing it—is in many jurisdictions held to be void, so that no action can be brought upon it.²⁵⁰ In many states, on the other hand, the defense of *ultra vires* is in such cases excluded, whether interposed for or against the corporation, on the ground of an equitable estoppel, when the contract has been wholly or partly performed on the part of the plaintiff, and it would be inequitable to allow the defense.²⁵¹ And as a rule, in all jurisdictions, where either party has received benefits under the contract in the form of money, property, or services, an action *quasi ex contractu* may be maintained

²⁴⁷ *Southern Life Ins. Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Witte v. Fishing Co.*, 2 Conn. 260; *Bulkley v. Same*, 2 Conn. 252, 7 Am. Dec. 271.

²⁴⁸ *MORVILLE v. SOCIETY*, 123 Mass. 129, 25 Am. Rep. 40; *Union Bank v. Jacobs*, 6 Humph. (Tenn.) 515; *London & N. W. Ry. Co. v. Price*, 11 Q. B. D. 485; *Simpson v. Hotel Co.*, 8 H. L. Cas. 712; *Ft. Worth City Co. v. Bridge Co.*, 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167.

²⁴⁹ *Clark, Corp.* 133 et seq.

²⁵⁰ *East Anglian Rys. Co. v. Railway Co.*, 11 C. B. 775; *Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Pearce v. Railroad Co.*, 21 How. 441, 16 L. Ed. 184; *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; *Central Transp. Co. v. Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198.

²⁵¹ *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Holmes & Griggs Mfg. Co. v. Metal Co.*, 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep.

to recover it.²⁵² A discussion of the law of corporations in relation to contracts is, however, beyond the scope of this book.²⁵³

134; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Day v. Buggy Co.*, 57 Mich. 151, 23 N. W. 628, 58 Am. Rep. 352; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907, 12 Am. St. Rep. 412; *Seymour v. Society*, 54 Minn. 147, 55 N. W. 907; *Manchester & L. R. Co. v. Railroad Co.*, 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. Rep. 582; *Union Hardware Co. v. Manufacturing Co.*, 58 Conn. 219, 20 Atl. 455.

²⁵² *Day v. Buggy Co.*, 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; *Davis v. Railroad Co.*, 131 Mass. 258, 41 Am. Rep. 221; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *Nashua & L. R. Corp. v. Railroad Corp.*, 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454; *Anthony v. Machine Co.*, 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575; *Moore v. Tanning Co.*, 60 Vt. 459, 15 Atl. 114.

²⁵³ See *Clark, Corp.* 170 et seq.

CHAPTER VII.

REALITY OF CONSENT.

- 129. In General.
- 130-131. Mistake.
- 132-134. Effect—Remedies.
- 135-138. Misrepresentation.
- 139. Fraud.
- 140-141. Effect—Remedies.
- 142-144. Duress.
- 145-146. Undue Influence.

IN GENERAL.

- 129. The mutual consent which is essential to every agreement must be real. There may be no real consent, and therefore no contract, because of**
- (a) Mistake,**
 - (b) Misrepresentation,**
 - (c) Fraud,**
 - (d) Duress, or**
 - (e) Undue influence.**

The next feature in the formation of contract to be considered is genuineness or reality of consent. If we have an apparent agreement possessing the element of form or consideration, or both, and made between parties capable of contracting, we must ask whether the consent of both or either of the parties was given under such circumstances as to make it no real expression of their intention.

There may be various causes for unreality of consent: (1) The parties may not have meant the same thing; or one or both, while meaning the same thing, may have formed untrue conclusions as to the subject-matter of the agreement. This is Mistake. (2) One of the parties may have been led to form untrue conclusions respecting the subject-matter of the agreement by statements innocently made, or facts innocently withheld by the other. This is Misrepresentation. (3) These untrue conclusions may have been induced by intentional misrepresentations or active concealment by the other party, or intentional concealment where there was a duty to disclose, for the purpose of deceiving. This is Fraud. (4) The consent of one of the parties may have been extorted from him by the other by actual or threatened violence. This is Duress. (5) Circumstances may have rendered one of the parties morally incapable of resisting the will of the other, so

that his consent was no real expression of intention. This is Undue Influence.¹

MISTAKE.

130. Mistake is where the parties did not mean the same thing, or where one or both, while meaning the same thing, formed untrue conclusions as to the subject-matter of the agreement.
131. Mistake avoids the contract in the following cases:
- (a) Where the mistake is as to the nature of a written contract, the execution of which is induced or procured by misrepresentation;
 - (b) Where the mistake is as to the identity of the person with whom the contract is made;
 - (c) Where the subject-matter of the contract, unknown to the parties, does not exist;
 - (d) Where two things have the same name, and the parties, owing to the identity of names, do not mean the same subject-matter;
 - (e) Where one of the parties is mistaken as to the nature of the promise made, and the other party knows, or has good reason to know, of the mistake. This, however, it seems, renders the contract merely voidable.

It must be borne in mind that we are here dealing with mistake of intention, and not mistake of expression. The parties may be genuinely agreed on the terms of their contract, but the terms may, by mistake, be so expressed as not to convey their meaning. In these cases they may be permitted to explain the contract, or the court may correct the mistake. This is mistake of expression, and pertains to the interpretation of contracts, with which we shall deal in a subsequent chapter.

The almost universal rule is that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence, or oppression. If he has exhibited all the outward signs of agreement, the law will hold that he has agreed. As a rule, a person cannot avoid his contract simply by showing that he has made a mistake. There are some exceptions to the rule, which we shall now consider.

Mistake as to the Nature of the Transaction—Written Instrument.

There are cases in which a contract will be void because of a mistake as to the nature of the transaction. Such cases arise in the execution of written instruments, and must arise almost of necessity from misrepresentation, either of a third person or of the other party. A man who has executed an instrument cannot avoid its operation by saying that he did not put his mind to it or that he did not suppose it would

¹ Anson, Cont. (8th Ed.) 127.

have any legal effect.² He must have been induced to execute it by some deceit or misrepresentation which ordinary diligence could not penetrate. Thus, where a man who is illiterate, or blind, or ignorant of the language, executes a deed, which is misread or misdescribed to him by the other party or a stranger, and the deed is in fact a different instrument from that which he was led to believe it to be, the deed is void.³ But if a man can read and does not read the document which he signs,⁴ or if, being unable to read, he signs without having it read,⁵ he will not be heard to say that the contract is void, although in such case, if he was induced to sign it by fraudulent misrepresentation as to the character or terms, it is generally held that the contract is voidable.⁶

In a leading case, the acceptor of a bill of exchange had induced a person to indorse it by telling him that it was a guaranty, and the defendant signed on the faith of the representation without seeing the face of the bill. It was held that, if the defendant was not guilty of any negligence in so signing, the bill did not bind him, even in the hands of a bona fide purchaser for value. It seems "plain, on principle and on authority," said the court, "that if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs, then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and

² *Hunter v. Walters*, L. R. 7 Ch. 81; *Cannon v. Lindsey*, 85 Ala. 198, 3 South. 676, 7 Am. St. Rep. 38. And see *Kennerty v. Phosphate Co.*, 21 S. C. 226, 53 Am. Rep. 669; *Little v. Little*, 2 N. D. 175, 49 N. W. 736; *Quimby v. Shearer*, 56 Minn. 534, 58 N. W. 155; *Campbell v. Van Houten*, 44 Mo. App. 231; *Liska v. Lodge*, 112 Mich. 635, 71 N. W. 171; *Royston v. Miller (C. C.)* 76 Fed. 50; *Chicago, St. P., M. & O. Ry. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358; *Muller v. Kelly (C. C.)* 116 Fed. 545; *Sheneberger v. Insurance Co.*, 114 Iowa, 578, 87 N. W. 493, 55 L. R. A. 269; *Martin v. Smith*, 116 Ala. 639, 22 South. 917; *Bostwick v. Mutual Life Ins. Co.*, 116 Wis. 392, 92 N. W. 246; *Fivey v. Railroad Co.*, 67 N. J. Law. 627, 52 Atl. 472, 91 Am. St. Rep. 445.

³ *Thoroughgood's Case*, 2 Coke, 9; *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; *Schuylkill Co. v. Copley*, 67 Pa. 386, 5 Am. Rep. 441; *Rockford, R. I. & St. L. R. Co. v. Shunick*, 65 Ill. 223; *Burlington Lumber Co. v. Lumber Co.*, 100 Iowa, 463, 69 N. W. 558; *Sibley v. Holcomb*, 104 Ky. 670, 47 S. W. 765.

⁴ Cases cited *supra*, note 2.

⁵ *Chicago, St. P., M. & O. Ry. Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358; *Muller v. Kelly (C. C.)* 116 Fed. 545.

⁶ *Post*, p. 228, note 126.

therefore, in contemplation of law, never did sign, the contract to which his name is appended." ⁷

In this case the contract was void, and therefore could not be enforced even by a bona fide holder. And the case would have been the same had the execution been obtained, without negligence on the part of the signer, by the fraud of the other party.⁸ In that case also the minds of the parties never meet, for the defrauded party thinks he is signing one instrument, and the defrauding party is aware that the signer is signing a different instrument. The case is, in effect, one of mistake, induced by fraud. If the ground of avoidance is the fraud of the other party, whereby the signer was induced to execute the instrument understandingly, the misrepresentation not relating to the character of the instrument, the contract, as we shall see, would be voidable, and not void.⁹

The absence of negligence is strongly dwelt upon by the court in the case above stated, and the jury had expressly negatived its existence. A person cannot assert the invalidity of a note or bill of exchange or deed, as against a bona fide purchaser for value, on the ground that through fraud and circumvention he was induced to sign, not knowing the nature of the instrument, unless he shows that he was not guilty of negligence; for if he was negligent he will be estopped from asserting the invalidity. If he shows this, but not otherwise, he may assert the invalidity of the instrument, even as against a bona fide purchaser.¹⁰ There are some cases which hold that a negotiable

⁷ FOSTER v. McKINNON, L. R. 4 C. P. 704. And see Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675; Kagel v. Totten, 59 Md. 447; Whitney v. Snyder, 2 Lans. (N. Y.) 477; Cline v. Guthrie, 42 Ind. 227, 13 Am. Rep. 357; WALKER v. EBERT, 29 Wis. 194, 9 Am. Rep. 54; Puffer v. Smith, 57 Ill. 527; Soper v. Peck, 51 Mich. 563, 17 N. W. 57; De Camp v. Hamma, 29 Ohio St. 467; Trambly v. Ricard, 130 Mass. 259; Corby v. Weddle, 57 Mo. 452; Detwiler v. Bish, 44 Ind. 70; Baldwin v. Bricker, 86 Ind. 221; Hewett v. Jones, 72 Ill. 208; Bowers v. Thomas, 62 Wis. 480, 22 N. W. 710; Schaper v. Schaper, 84 Ill. 603; Vanbrunt v. Singley, 85 Ill. 281; Esterly v. Eppelsheimer, 73 Iowa, 260, 34 N. W. 846; Wood v. Lock Co., 96 Ga. 120, 22 S. E. 909.

⁸ McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 844; Esterly v. Eppelsheimer, 73 Iowa, 260, 34 N. W. 846; Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046, 36 L. R. A. 434, 60 Am. St. Rep. 184; Lindley v. Hofman, 22 Ind. App. 237, 53 N. E. 471. And see cases cited in note 7, supra, and note 10, infra.

⁹ Post, p. 239.

¹⁰ Chapman v. Rose, 56 N. Y. 138, 15 Am. Rep. 401; Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427; Taylor v. Atchison, 54 Ill. 196, 5 Am. Rep. 118; Mackey v. Peterson, 29 Minn. 298, 13 N. W. 132, 43 Am. Rep. 211; Upton v. Tribilcock, 91 U. S. 50, 23 L. Ed. 203; Gavagan v. Bryant, 83 Ill. 376; Leach v. Nichols, 55 Ill. 273; Ross v. Doland, 29 Ohio St. 473; Douglas v. Matting, 29 Iowa, 498, 4 Am. Rep. 238; Fayette Co. Sav. Bank v. Steffes, 54 Iowa, 214, 6 N. W. 267; Millard v. Barton, 13 R. I. 601; Baldwin v. Barrows, 86 Ind. 351; Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Ort v. Fowler, 31 Kan.

instrument cannot be avoided in the hands of a bona fide holder, even though there was no negligence;¹¹ but the great weight of authority is in favor of the rule above stated.

Mistake as to the Person with Whom the Contract is Made.

A mistake as to the person with whom the contract is made may avoid it; as, for instance, where a contract is made with one person under a belief that it is being made with another. Where a man intends to contract with one person, another cannot make himself a party to the contract by substituting himself; for, in the first place, a man, in entering into a contract, looks to the credit and character of the person with whom he supposes he is contracting,¹² and, in the second place, the person who thus substitutes himself is never present in the mind of the other party, and the latter, therefore, does not consent to a contract with him. Where a man imitated another's signature, and thereby induced persons to supply him with goods under the belief that they were supplying the person whose signature was imitated, it was held that there was no contract with the person so procuring the goods. "Of him," says Lord Cairns, "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required."¹³

In this case the mistake was induced by fraud, but an innocent mistake may produce the same result. Thus, where an order for goods was sent to a particular person, and a man who had succeeded to his business filled the order without giving notice of the change, it was held that he could not recover the price of the goods. "In order to entitle the plaintiff to recover," it was said, "he must show that there was a contract with himself."¹⁴ And on the same principle, if a man sells goods to another, representing that he is the owner, and the other party intends to buy from him, there is no contract with the real owner,

478, 2 Pac. 580, 47 Am. Rep. 501; Weller's Appeal, 103 Pa. 594; Johnston v. Patterson, 114 Pa. 398, 6 Atl. 746; Shirts v. Overjohn, 60 Mo. 305; Citizens' Nat. Bank v. Smith, 55 N. H. 593. And see cases cited supra, note 8.

¹¹ First Nat. Bank v. Johns, 22 W. Va. 520, 46 Am. Rep. 506 (collecting cases).

¹² Humble v. Hunter, 12 Q. B. 311; BOSTON ICE CO. v. POTTER, 123 Mass. 28, 25 Am. Rep. 9.

¹³ CUNDY v. LINDSAY, L. R. 3 App. Cas. 465. Post, p. 239.

¹⁴ BOULTON v. JONES, 2 Hurl. & N. 564. And see BOSTON ICE CO. v. POTTER, 123 Mass. 28, 25 Am. Rep. 9; Randolph Iron Co. v. Elliott, 34 N. J. Law, 184; Gregory v. Wendell, 40 Mich. 443; Barnes v. Shoemaker, 112 Ind. 512, 14 N. E. 367; Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 98; Fox v. Tabel, 66 Conn. 397, 34 Atl. 101.

who was the undisclosed principal of the seller, for "every man has a right to elect what parties he will deal with."¹⁵ So, also, if a man obtains goods from another by falsely representing that he is the agent of another person, to whom the owner of the goods thinks he is selling them, the sale is void.¹⁶ To render the sale void, however, there must be a false representation that the agency exists, and not merely belief in its existence on the part of the seller, and intent to sell to the supposed principal.¹⁷

Mistake as to Subject-Matter of Contract.

If a man knows the nature of the transaction, and the party with whom he is entering into legal relations, it is, for the most part, his own fault if the subject-matter of the contract—the thing contracted for and the terms of the bargain—is not what he supposed. "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."¹⁸ And so, if the parties are agreed in clear terms, and one of them does not get what he anticipates under the contract, this is, if anything, failure of performance, and not mistake. Cases cited in illustration of the rule that a man is not bound to accept a thing substantially different from that which he bargained for¹⁹ have nothing to do with the formation of contract, and we must keep these questions of mistake and so-called failure of consideration clearly apart.

¹⁵ *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Mitchell v. Railroad*, 45 Mo. App. 273. It is not meant that an agent must always disclose his agency. An agent may sell the property of his principal without disclosing that he acts as agent, or that the property is not his own; and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal. *Huntington v. Knox*, 7 Cush. (Mass.) 371. See *Tiffany*, Ag. 304-307.

¹⁶ *Hardman v. Booth*, 1 Hurl. & C. 803; *Hollins v. Fowler*, L. R. 7 H. L. 757; *Hamet v. Letcher*, 37 Ohio St. 356, 41 Am. Rep. 519; *Hentz v. Miller*, 94 N. Y. 67; *Barker v. Dinsmore*, 72 Pa. 427, 13 Am. Rep. 697; *EDMUNDS v. TRANSPORTATION CO.*, 135 Mass. 283; *McCrillis v. Allen*, 57 Vt. 505; *Peters Box & Lumber Co. v. Lesh*, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 337. So, also, where a person obtains goods by falsely representing that he is member of a firm, and gives in payment a forged check of the firm. *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; *Moody v. Blake*, 117 Mass. 23, 19 Am. Rep. 394. So, also, where a person obtains goods by falsely representing that he is agent of an undisclosed principal. *Rodliff v. Dollinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439. See, also, *Paine v. Loeb*, 96 Fed. 164, 37 C. C. A. 434; post, p. 239.

¹⁷ *STODDARD v. HAM*, 129 Mass. 383, 37 Am. Rep. 369.

¹⁸ Per Blackburn, J., in *Smith v. Hughes*, L. R. 6 Q. B., at page 607.

¹⁹ *GOMPERTZ v. BARTLETT*, 2 El. & Bl. 849; *Couder v. Hall*, 26 B. (N. S.) 22.

Mistake as to the subject-matter of a contract will only avoid it at law in a few cases. Equity, however, may grant relief in cases where the law may afford no remedy.²⁰

Same—Mistake as to Existence of Subject-Matter.

If the agreement is in respect of a thing which, unknown to both parties, does not exist at the time of entering into the contract, this goes to the very root of the matter, and avoids the contract. It seems that this rests upon the ground that the existence of the subject-matter is a condition of the contract, rather than upon the ground of mutual mistake.²¹ The subject belongs with impossibility of performance; but, inasmuch as the thing agreed upon has ceased to be possible before the agreement, such impossibility prevents a contract from ever arising, and does not operate, as impossibility arising subsequent to the agreement will sometimes operate, as a form of discharge. One of the leading English cases on this subject arose out of a sale of a cargo of corn which was supposed by the parties, at the time of the sale, to be on its voyage to England, but which, in fact, having become heated on the voyage, had been unloaded and sold. It was held that the contract was void, inasmuch as it "plainly imported that there was something which was to be sold at the time of the contract, and something to be purchased," whereas the object of the sale had ceased to exist.²² So, also, where a person purchased an annuity which, at the time of the purchase, had ceased to exist owing to the death of the annuitant, it was held that he could recover the price which he had paid for it.²³ And so where the subject-matter of the contract is a right or title which, unknown to the parties, does not exist.²⁴ There are some cases seemingly at variance with this rule, but they are cases

²⁰ See *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. 61; *Gelb v. Reynolds*, 35 Minn. 331, 28 N. W. 923; *Fleetwood v. Brown*, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779; *Thwing v. Lumber Co.*, 40 Minn. 184, 41 N. W. 815.

²¹ See *Anson*, Cont. (8th Ed.) 135; *Pollock*, Cont. (3d Ed.) 386, 455.

²² *Couturier v. Hastie*, 5 H. L. Cas. 673. See, also, *Allen v. Hammond*, 11 Pet. 63, 9 L. Ed. 633; *GIBSON v. PELKIE*, 37 Mich. 380; *Thompson v. Gould*, 20 Pick. (Mass.) 134; *Ketchum v. Catlin*, 21 Vt. 191; *King v. Doolittle*, 1 Head (Tenn.) 77; *Scioto Fire Brick Co. v. Pond*, 38 Ohio St. 65; *Anderson v. Armistead*, 69 Ill. 452; *Fritzler v. Robinson*, 70 Iowa, 500, 31 N. W. 61; *Riegel v. Insurance Co.*, 153 Pa. 134, 25 Atl. 1030; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Thwing v. Lumber Co.*, 40 Minn. 184, 41 N. W. 815; *United States v. Charles*, 74 Fed. 142, 20 C. C. A. 346; *Nordyke & Marmon Co. v. Kehl*, 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600.

²³ *STRICKLAND v. TURNER*, 7 Exch. 208. And see *Cochran v. Willis*, L. R. 1 Ch. App. 58.

²⁴ *BINGHAM v. BINGHAM*, 1 Ves. Sr. 126; *COOPER v. PHIBBS*, L. R. 2 H. L. 170; *Varnum v. Town of Hygate*, 65 Vt. 416, 26 Atl. 628; *Hamilton v. Park & McKay Co.*, 125 Mich. 72, 83 N. W. 1018; post, p. 208.

in which the contract was absolute, and not impliedly conditional upon the existence of the subject-matter.²⁵

Same—Mistake as to Identity of Subject-Matter.

An agreement may be void where there is a mistake as to the identity of the subject-matter; as, for instance, where the contract is in reference to a thing of a certain name, and one of the parties thinks he is contracting for one thing that answers the description, while the other party thinks it is something else which also answers the description. Thus, where a person agreed to buy a cargo "to arrive ex Peerless from Bombay," and there were two ships of that name, and the buyer meant one, and the seller the other, it was held that there was no contract.²⁶

The things meant by the parties must have fitted the description, or there is no mistake. If, in the case above mentioned, the buyer had meant a ship of a different name, he would have been bound by the terms of his contract. Unless the description admits of more meanings than one, the party setting up mistake can only do so by showing that he meant something different from what he said, and, as we have seen, he cannot do this. Nor will a mere misnomer of the subject-matter of a contract entitle either party to avoid it if the contract itself contains such a description of its subject-matter as practically identifies it.²⁷

Same—Mistake as to Nature and Essential Qualities of Subject-Matter.

If the parties are agreed as to the terms and subject-matter of the contract, it is complete by mutual assent, notwithstanding that the

²⁵ *Barr v. Gibson*, 3 Mees. & W. 390; *HILLS v. SUGHRUE*, 15 Mees. & W. 253. "The parties to an agreement must be acquainted with the extent of their rights and the nature of the information they can call for respecting them, else they will not be bound. The reason is that they proceed under an idea that the fact which is the inducement to the contract is in a particular way, and give their assent, not absolutely, but on conditions that are falsified by the event. But where the parties treat upon the basis that the fact which is the subject of the agreement is doubtful, and the consequent risk each is to encounter is taken into consideration in the stipulations assented to, the contract will be valid, notwithstanding any mistake of one of the parties, provided there be no concealment or unfair dealing by the opposite party that would affect any other contract." *Perkins v. Gay*, 3 Serg. & R. (Pa.) 327, 7 Am. Dec. 653.

²⁶ *RAFFLES v. WICHELHAUS*, 2 Hurl. & C. 906. And see *Gardner v. Lane*, 9 Allen (Mass.) 492, 85 Am. Dec. 779; *KYLE v. KAVANAGH*, 103 Mass. 356, 4 Am. Rep. 560; *Thornton v. Kempster*, 5 Taunt. 786; *Cutts v. Guild*, 57 N. Y. 229; *Sheldon v. Capron*, 3 R. I. 171; *Harvey v. Harris*, 112 Mass. 32. Where on a sale of land one party thinks he is buying one tract, and the other party thinks he is selling a different tract, there is no con-

²⁷ *Ionides v. Pacific Ins. Co.*, L. R. 6 Q. B. 686; *Hazard v. Insurance Co.*, 1 Sumn. 218, Fed. Cas. No. 6,282.

parties may be totally mistaken in the motives which induced the assent. The fact that the subject-matter of the contract possessed, or failed to possess, qualities which the parties both believed, or did not believe, it to possess, is immaterial.²⁸ The parties may, indeed, make the existence of some quality a condition of the contract, as if they should contract for the sale of "this uncut diamond," in which case, if the contract should be construed as making it a condition that the uncut stone in question should be a diamond and in fact the stone was not a diamond, there would be no contract, because the subject-matter of the contract was not in existence.²⁹ On the other hand, if the subject of sale was an uncut stone, as a matter of fact believed by both parties to be a diamond, but there was nothing in the terms of the contract to make it a condition that the stone should be a diamond, their mutual mistake as to the nature of the stone would not affect the validity of the contract.³⁰ Thus, where a woman sold an uncut stone to a jeweler for \$1, both being ignorant of the nature of the stone, and it turned out to be a diamond worth \$1,000, it was held that the contract was binding.³¹ So where the subject of sale was a note, the maker of which the parties mutually supposed to be solvent.³² It is difficult to reconcile with the current of authority the case of Sher-

tract. *KYLE v. KAVANAGH*, *supra*; *Strong v. Lane*, 66 Minn. 94, 68 N. W. 765. And see *Irwin v. Wilson*, 45 Ohio St. 426, 15 N. E. 209.

²⁸ *WOOD v. BOYNTON*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610; *HECHT v. BATCHELLER*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708; *Taylor v. Fleet*, 4 Barb. 95; *Taylor v. Ford*, 131 Cal. 440, 63 Pac. 770. A settlement with a railway company for injuries is binding, although the parties were ignorant of the extent of the injuries. *Rideal v. Railway Co.*, 1 Fost. & F. 706; *Seeley v. Traction Co.*, 179 Pa. 334, 36 Atl. 229; *KOWALKE v. LIGHT CO.*, 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877; *Houston & T. C. R. Co. v. McCarty*, 94 Tex. 298, 60 S. W. 429, 53 L. R. A. 507, 86 Am. St. Rep. 854.

²⁹ "But sometimes, even when the thing which is the subject-matter of an agreement is specifically ascertained, the agreement may be avoided by material error as to some attribute of the thing, for some attribute which the thing in truth has not may be a material part of the description by which the thing was contracted for. If this is so, the thing as it really is, namely, without that quality, is not that to which the common intention of the parties was directed, and the agreement is void. An error of this kind will not suffice to make the transaction void, unless (1) it is such that, according to the ordinary course of dealing and use of language, the difference made by the absence of the quality wrongly supposed to exist amounts to a difference in kind; (2) and the error is also common to both parties." Pol. Cont. (3d Ed.) 450. See, on this point, *Brant. Cont.* 104-108; *Miles v. Stevens*, 3 Pa. 21, 45 Am. Dec. 621; *Irwin v. Wilson*, 45 Ohio St. 426, 15 N. E. 209; *Watson v. Brown*, 113 Iowa, 308, 85 N. W. 28.

³⁰ *Hood v. Todd* (Ky.) 58 S. W. 783.

³¹ *WOOD v. BOYNTON*, 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.

³² *HECHT v. BATCHELLER*, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708.

wood v. Walker, where the subject of sale was a blooded cow, believed by the parties to be barren, and hence worth only \$80, which was the price, but actually capable of breeding, and hence worth not less than \$750, and it was held that the seller could rescind on the ground that the mistake went to the substance of the agreement.³³

Same—Mistake as to Quantity or Price.

Quantity as well as quality may be a condition of the contract, and in such case, if the designated quantity does not exist, there is no contract because of the nonexistence of the subject-matter. Where, for example, the contract is for the sale of a described tract, which is also described as containing a certain number of acres, it has been held that a material difference in the quantity is ground for rescission.³⁴

Of course, if the acceptance varies from the terms of the offer, there is no contract. Thus, where, by mistake of a telegraph clerk, an offer is wrongly transmitted, and is accepted as altered, it has been held that the offeror is not bound.³⁵ So if the price is stated in such terms that the offeree understands it as for one quantity, while the offeror means it in another, the parties are never *ad idem*.³⁶ The effect of such mistake is merely to show that there was no contract, because of the failure of the minds of the parties to meet.

Mistake as to Nature of Promise Known to the Other Party.

Except as stated in the preceding paragraphs, the only form of mistake that can affect the validity of a contract is where there is a mistake on the part of one of the parties as to the nature of the promise, and the other party knows of the mistake.

³³ SHERWOOD v. WALKER, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531.

³⁴ Newton v. Tolles, 66 N. H. 136, 19 Atl. 1092, 9 L. R. A. 50, 49 Am. St. Rep. 593. As to mistake as to quantity of land, and relief in equity, see Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371; Miller v. Craig, 83 Ky. 623, 4 Am. St. Rep. 179; Pratt v. Bowman, 37 W. Va. 715, 17 S. E. 210; Hill v. Buckley, 17 Ves. 394; Rogers v. Pattie, 96 Va. 498, 31 S. E. 897; Bingham v. Madison, 103 Tenn. 358, 52 S. W. 1074, 47 L. R. A. 267.

³⁵ Henkel v. Pape, L. R. 6 Exch. 7; Pegram v. Telegraph Co., 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557; Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. 782, 4 L. R. A. 660, 10 Am. St. Rep. 699. Some courts, however, hold the contrary, on the ground that the telegraph company, being selected by the proposer, is his agent, and that he and not the other party should suffer loss from the error. His remedy is against the telegraph company if it was negligent. See Western Union Tel. Co. v. Shotton, 71 Ga. 760; AYER v. TELEGRAPH CO., 79 Me. 493, 10 Atl. 495. And see Durkee v. Railroad Co., 29 Vt. 127; Anheuser-Busch Brewing Ass'n v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575; Howley v. Whipple, 48 N. H. 487; Saveland v. Green, 40 Wis. 431; Barons v. Brown, 25 Kan. 410.

³⁶ Greene v. Bateman, 2 Woodb. & M. 350. See, also, RUPLEY v. DAGGETT, 74 Ill. 351; ROVEGNO v. DEFFERARI, 40 Cal. 459; Peerless Glass Co. v. Tinware Co., 121 Cal. 641, 54 Pac. 101.

It must be remembered that we are speaking here of contracts which are *prima facie* valid, and we must exclude from our consideration cases in which the offer and acceptance never agreed in terms, so that there was never the outward form of agreement, and cases in which the meaning of the terms is disputed, so that the court must determine whether the contract has, upon its true construction, been performed or broken.

A mistake on the part of one of the parties to a contract, as a misunderstanding in respect to the nature or qualities of the subject-matter, or a mistake in fixing or expressing the terms, not induced by the conduct of the other party, has as a rule no effect upon the contract.³⁷ But the law will not allow one party to accept a promise, which he knows that the other party understands in a different sense from that in which he understands it.³⁸ If the mistake or misunderstanding of the one party as to the nature of the promise is known to the other, or if the other has reason to know it, the contract is voidable.³⁹ Thus where a person was sued for refusing to accept some oats which he had agreed to buy from the plaintiff, on the ground that he had agreed and intended to buy old oats, and that those supplied were new, the jury were told that, if the plaintiff knew that the defendant "thought he was buying old oats," then he could not recover. The court of review, however, held that this was not enough to avoid the sale; that in order to do so the plaintiff must have known that the defendant "thought he was being promised old oats." It was not knowledge of the misapprehension of the quality of the oats, but knowledge of the misapprehension of the quality promised, which would defeat a recovery.⁴⁰ So where the seller, intending to offer cattle for \$261.50, by a slip of the tongue offered them for \$161.50, and the buyer, having good reason to suppose that the price named was a mistake, accepted the offer and paid \$20 on account, and the seller tendered back the \$20, and repudiated the sale, it was held that the buyer was not entitled to maintain *replevin*.⁴¹ And where by mistake the plaintiff in compiling a rate sheet printed the fare at \$21.25 instead of \$36.70, and the

³⁷ *Scott v. Littledale*, 8 El. & Bl. 815; *People's Bank v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481; *LAIDLAW v. ORGAN*, 2 Wheat. 178, 4 L. Ed. 214; *Borden v. Railroad Co.*, 113 N. C. 570, 18 S. E. 392, 37 Am. St. Rep. 632; *Griffin v. O'Neil*, 48 Kan. 117, 29 Pac. 143; *Seeley v. Traction Co.*, 179 Pa. 334, 36 Atl. 229; *Brown v. Levy*, 29 Tex. Civ. App. 389, 69 S. W. 255.

³⁸ *Anson, Cont.* (8th Ed.) 138.

³⁹ *Smith v. Hughes*, L. R. 6 Q. B. 597; *Thayer v. Knote*, 59 Kan. 181, 52 Pac. 433. Sir William Anson says "void." *Anson, Cont.* (8th Ed.) 138.

⁴⁰ *Smith v. Hughes*, *supra*.

⁴¹ *Harran v. Foley*, 62 Wis. 584, 22 N. W. 837. See, also, *Webster v. Cecil*, 30 Beav. 62; *Tamplin v. Jones*, 15 Ch. D. 221; *Gerrard v. Frankel*, 30 Beav. 445; *Everson v. Granite Co.*, 65 Vt. 658, 27 Atl. 320.

defendant, who had discovered the mistake, purchased tickets at the printed price, it was held that the plaintiff could rescind.⁴²

This subject is treated by Sir William Anson and many other writers under mistake, but most of the courts of this country treat it as a question of fraud. Whatever classification is adopted, it seems that mistake of the character under consideration can have no greater effect than to render the contract voidable, not void.

Mistake of Law.

As a rule, ignorance or mistake of law, by reason of which the parties do not understand the legal effect of their contract, does not avoid it, unless there is some fraud, or unless there is a relation of confidence between the parties.⁴³

In cases where the nonexistence of a right is concerned, it has been said that the mistake is not a mistake of law, so as to render the avoidance of a contract on that ground a violation of the rule that ignorance of law is no excuse. "It is said, 'Ignorantia juris haud excusat;' but in that maxim the word 'jus' is used in the sense of denoting general law,—the ordinary law of the country. But, when the word 'jus' is used as denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of a matter of law; but, if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."⁴⁴ Under this rule, the sale of

⁴² SHELTON v. ELLIS, 70 Ga. 297. A contract to furnish the government with many articles at stipulated prices, among them shucks at 60 cents per pound, was unenforceable as to the shucks, where the government showed that they were worth from \$12 to \$35 per ton; that it was customary to buy them by the hundred weight; and that the seller failed to strike out the word "pounds" on the printed form of proposal, and to insert "hundred weight" instead, though the seller insisted that there was no mistake on his part. Hume v. United States, 132 U. S. 406, 10 Sup. Ct. 838, 33 L. Ed. 393. See, also, Moffett, Hodgkins & Clarke Co. v. City of Rochester, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108.

⁴³ Birkhauser v. Schmitt, 45 Wis. 316, 30 Am. Rep. 740; FISH v. CLELAND, 33 Ill. 243; Hunt v. Rousmanier, 1 Pet. 1, 7 L. Ed. 27; Storrs v. Barker, 6 Johns. Ch. 166; Starr v. Bennett, 5 Hill (N. Y.) 303; Bank of United

⁴⁴ COOPER v. PHIBBS, L. R. 2 H. L. 170, per Lord Westbury. And see Wilson v. Insurance Co., 60 Md. 157; Toland v. Corey, 6 Utah, 392, 24 Pac. 190; Lovell v. Wall, 31 Fla. 73, 12 South. 659; Motherway v. Wall, 168 Mass. 333, 47 N. E. 135. "In the often quoted passage * * * he [Lord Westbury] only meant that certain words, such as 'ownership,' 'marriage,' 'settlement,' etc., import both a conclusion of law and facts justifying it, so that, when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion, and a mistake induced by such an assertion is a mistake of fact." Alton v. Bank, 157 Mass. 341, 32 N. E. 228, 18 L. R. A. 144, 34 Am. St. Rep. 285, per Holmes, J.

a thing which, unknown to the parties, already belongs to the buyer, or does not belong to the seller, is void.⁴⁵ This is not a mistake of law, but of fact.

Ignorance of foreign laws, including the laws of a sister state, is regarded as ignorance of fact, and not of law, since a person is not bound to acquaint himself with them.⁴⁶

A mistake in drawing up a contract, or a mistake in the legal effect of a description in a deed or other writing, or in the use of technical language, may be ground for relief in equity.⁴⁷

SAME-EFFECT-REMEDIES.

132. EFFECT. Mistake, where it has any effect, as a rule renders a contract void.

133. REMEDIES AT LAW. At common law the contract may be repudiated if it is executory, or, if executed in whole or in part, what has been paid or delivered under it may be recovered back.

134. REMEDIES IN EQUITY. In equity a suit for specific performance may be resisted; or suit may be brought to declare the contract void; or, if the mistake is merely in drawing up the contract, suit may be brought to reform the instrument.

As we shall presently see, fraud renders a contract voidable only. The effect of mistake, however, where it has any operation at all, is, as a rule,⁴⁸ to render the contract void. The common law, therefore,

States v. Daniel, 12 Pet. 32, 9 L. Ed. 989; *Mellish v. Robertson*, 25 Vt. 603; *Good v. Herr*, 7 Watts & S. (Pa.) 253, 43 Am. Dec. 236; *Rice v. Manufacturing Co.*, 2 Cush. (Mass.) 80; *Dodge v. Insurance Co.*, 12 Gray (Mass.) 65; *Hubbard v. Martin*, 8 Yerg. (Tenn.) 498; *Townsend v. Cowles*, 31 Ala. 428; *Christy v. Sullivan*, 50 Cal. 337; *Wheaton v. Wheaton*, 9 Conn. 96; *Goltra v. Sanasack*, 53 Ill. 458; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Porter v. Jefferies*, 40 S. C. 92, 18 S. E. 229; *Osburn v. Throckmorton*, 90 Va. 311, 18 S. E. 285; *Pittsburgh & L. R. Iron Co. v. Iron Co.*, 118 Mich. 109, 76 N. W. 395; post, pp. 226, 542. But see *Lowndes v. Chisholm*, 2 McCord, Eq. (S. C.) 455, 16 Am. Dec. 667.

⁴⁵ 2 Bl. Comm. 450; *Trigg v. Read*, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447; *BINGHAM v. BINGHAM*, 1 Ves. Sr. 126; *Martin v. McCormick*, 8 N. Y. 331; *Cutts v. Guild*, 57 N. Y. 229. Contra, *Birkhauser v. Schmitt*, 45 Wis. 316, 30 Am. Rep. 740. Ante, p. 201.

⁴⁶ *HAVEN v. FOSTER*, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; *Vinal v. Improvement Co.*, 53 Hun, 247, 6 N. Y. Supp. 595; *Bank of Chillicothe v. Dodge*, 8 Barb. (N. Y.) 233; *Wood v. Roeder*, 50 Neb. 476, 70 N. W. 27; *Rosenbaum v. Credit System Co.*, 64 N. J. Law, 34, 44 Atl. 966.

⁴⁷ *Canedy v. Marcy*, 13 Gray (Mass.) 373; *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52; *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 35 L. Ed. 678; *Benson v. Markoe*, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816; *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925; *Pinkham v. Pinkham*, 60 Neb. 600, 83 N. W. 837.

⁴⁸ As to the effect of mistake of one party known to the other. Ante, p. 204.

offers two remedies to a person who has entered into an agreement which is void on the ground of mistake. If it be still executory, he may repudiate it, and successfully defend an action brought upon it. If he has paid money under it, he may recover it back upon the general principle that "where money is paid to another under the influence of a mistake,—that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue,—an action will lie to recover it back."⁴⁹

In equity the victim of the mistake may resist specific performance of the contract, and may sometimes do so successfully when he might not be able to successfully defend an action at law for damages arising from its breach.⁵⁰ He may also sue to have the contract declared void, and to be freed from his liabilities in respect of it. If the mistake was in drawing up the contract, a suit in equity may be brought to correct the mistake, and reform the instrument so it will express the real intention of the parties.⁵¹

A party who is entitled to avoid a contract on the ground of mistake must rescind at law, or seek his relief in equity, within a reasonable time after knowledge of the mistake.⁵²

MISREPRESENTATION.

135. Misrepresentation is an innocent misstatement or nondisclosure of facts. It must be distinguished from

- (a) **Fraud, which is a false representation (or nondisclosure under such circumstances that it amounts to a misrepresentation) known to be false, or made in reckless ignorance as to its truth or falsity.**
- (b) **Conditions and warranties, which are representations constituting terms of the contract.**

⁴⁹ KELLY v. SOLARI, 9 Mees. & W. 54; WHEADON v. OLDS, 20 Wend. (N. Y.) 174; post, pp. 536, 542.

⁵⁰ Webster v. Cecil, 30 Beav. 62; Frisby v. Ballance, 4 Scam. (Ill.) 287, 39 Am. Dec. 409; Trigg v. Read, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447.

⁵¹ Elliott v. Sackett, 108 U. S. 132, 2 Sup. Ct. 375, 27 L. Ed. 678; Beardsley v. Knight, 10 Vt. 185, 33 Am. Dec. 193; Newcomer v. Kline, 11 Gill & J. (Md.) 457, 37 Am. Dec. 74; Kilner v. Smith, 77 N. Y. 226, 33 Am. Rep. 613; Jenks v. Fritz, 7 Watts & S. (Pa.) 201, 42 Am. Dec. 227; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231; Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371.

⁵² Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798; Thomas v. Bartow, 48 N. Y. 193; Sable v. Maloney, 48 Wis. 331, 4 N. W. 479; Dodge v. Insurance Co., 12 Gray (Mass.) 71; Diman v. Railroad Co., 5 R. I. 130.

SAME-EFFECT.

- 136.** Mere misrepresentation has at law no effect on a contract, except in the case of contracts said to be *uberrimæ fidei*, in which, from their nature, or from the particular circumstances, one party must rely on the other for his knowledge of the facts, and the other is bound to the utmost good faith. These are:
- (a) Contracts of marine, fire, and life insurance.
 - (b) Contracts between persons occupying a confidential relation, as between attorney and client, principal and agent, guardian and ward, trustee and cestui que trust, etc.
 - (c) To a limited extent, contracts for the sale of land.
 - (d) In England, and probably with us, contracts with promoters of a corporation for the purchase of shares.
- 137.** Where misrepresentation has any effect at all, it renders the contract voidable.
- 138.** A material misrepresentation is ground for granting or refusing equitable relief.

Distinguished from Fraud.

"Misrepresentation," as the term is here used, must be distinguished from "fraud," with which we are to deal presently. Misrepresentation means an innocent misstatement or nondisclosure of facts, while fraud consists in representations which are known to be false, or which are made in reckless ignorance of their truth or falsity, or in nondisclosure or concealment of facts under such circumstances that it amounts to a representation that the facts concealed do not exist. This will be more fully explained in treating of fraud. The practical test of fraud, as opposed to mere misrepresentation, is that fraud gives rise to an action *ex delicto*, while innocent misrepresentation does not. Fraud, besides being a vitiating element in contract, is a tort or wrong apart from contract, and may be treated as such by bringing an action of deceit. Misrepresentation, in exceptional cases, may invalidate a contract, but will not support an action of deceit.

Distinguished from Conditions and Warranties.

It may be stated as a rule, subject to exception in case of certain contracts to be hereafter noticed, that innocent misrepresentation or nondisclosure of fact does not affect the validity of consent. The tendency of the courts has been to bring, if possible, every statement which is important enough to affect consent into the terms of the contract, and a representation which cannot be shown to have had so material a part in determining consent as to have formed, if not the basis of the contract, at least an integral part of its terms, is set aside altogether. If it is a part of the contract, it is no longer called a mere misrepresentation; it is a condition or warranty, and its falsity does not

affect the formation of the contract, but operates to discharge the injured party from his obligation, or gives him a right of action based on the contract for loss sustained by reason of the untruth of the statement. The statement in such case is a term of the contract.

The distinctions are well shown in a leading English case. The action was brought on a charter party in which it was agreed that the plaintiff's ship, "then in the port of Amsterdam," should proceed to a certain port and load a cargo. At the date of the contract the ship was not in the port of Amsterdam, and did not arrive there for several days. The defendant refused to carry out the agreement, and repudiated it. The court held that the statement that the ship was in the port of Amsterdam was intended by the parties to be a condition, and a breach thereof discharged the charterer.⁵³ Williams, J., in giving judgment, thus distinguishes the various parts or terms of a contract: "Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract, and consequently the contract is not broken, though the representation proves to be untrue; nor (with the exception of the case of policies of insurance,—at all events, marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. * * * Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the court, and not the jury, must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. In the construction of char-

⁵³ *BEHN v. BURNES*, 3 Rest & S. 751. And see *Davison v. Von Lingen*, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885; *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768; *NORRINGTON v. WRIGHT*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. As to the distinction in contracts of insurance, see *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Schwarzbach v. Protective Union*, 25 W. Va. 655, 52 Am. Rep. 227.

ter parties, this question has often been raised with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus, a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition,⁵⁴ while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement.⁵⁵ But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that, if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty; that is to say, a condition on the failure or nonperformance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz. a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

Same—Various Senses of the Terms and Their Effect.

It will be observed ⁵⁶ that in the opinion above quoted "condition" is used in two senses,—as meaning a statement that a thing is, and a promise that a thing shall be. In either case the statement or promise is of so important a nature that the untruth of the one, or the breach or the other, discharges the contract. "Warranty" also is used in several senses. It is first made a convertible term with a condition. It is then used "in the narrower sense of the word," in which sense it means (1) a subsidiary promise in the contract, the breach of which could under no circumstances do more than give rise to an action for damages, and (2) a condition, the breach of which might have discharged the contract had it not been so far acquiesced in as to lose its effect for that purpose, though it may give rise to an action for damages.

The various senses of the terms we have been discussing, and their effect, may be summed up as follows: (1) "Representations," not fraudulent, made at the time of entering into the contract, but not forming a part of it, may affect its validity in certain special cases, but are otherwise inoperative. When they do operate, their falsehood vitiates the formation of the contract and makes it voidable. (2) "Condi-

⁵⁴ GLAHOLM v. HAYS, 2 Man. & G. 257.

⁵⁵ SEEGER v. DUTHIE, 8 C. B. (N. S.) 45; TARRABOCHIA v. HICKIE, 1 Hurl. & N. 183.

⁵⁶ See Anson, Cont. (8th Ed.) 149.

tions" are either statements or promises which form the basis of the contract. Whether or not a term in the contract amounts to a condition must be a question of construction, to be answered by ascertaining the intention of the parties from the wording of the contract and the circumstances under which it was made. But when a term in the contract is ascertained to be a condition, then, whether it be a statement or a promise, the untruth or the breach of it will entitle the party to whom it is made to be discharged from his liabilities under the contract. (3) "Warranties," used in "the narrower sense," are independent subsidiary promises, the breach of which does not discharge the contract, but gives to the injured party a right of action for such damage as he has sustained by the failure of the other to fulfill his promise. (4) A condition may be broken, and the injured party may not avail himself of his right to be discharged, but continue to take benefit under the contract, or, at any rate, to act as though it were still in operation. In such a case the condition sinks to the level of a warranty, and the breach of it, being waived as a discharge, can only give a right of action for the damage sustained.⁵⁷ This is sometimes called a "warranty *ex post facto*."

A strong illustration of the tendency of the courts to bring a statement material enough to affect consent into the terms of the contract is offered by an English case arising out of a sale of hops by the plaintiff to the defendant. It appeared that, before commencing to deal, the defendant asked the plaintiff if any sulphur had been used in the treatment of that year's crop. The plaintiff said, "No." The defendant said that he would not even ask the price if any sulphur had been used. After this the parties discussed the price, and the defendant agreed to purchase the crop of that year. He afterwards repudiated the contract on the ground that sulphur had been used, and the plaintiff sued for the price. It was shown that the plaintiff had used sulphur over 5 acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made by the plaintiff as to the use of sulphur was not willfully false, and they further found that "the affirmation that no sulphur had been used was intended by the parties to be a part of the contract of sale, and a warranty by the plaintiff." The court had to consider the effect of this finding, and came to the conclusion that the representation of the plaintiff was a part of the contract, and a preliminary condition, the breach of which entitled the defendant to be discharged from liability. Erle, C. J., said: "We avoid the term 'warranty' because it is used in two senses, and the term 'condition' because the question is whether

⁵⁷ *Avery v. Willson*, 81 N. Y. 311, 37 Am. Rep. 503; post, p. 466.

that term is applicable. Then the effect is that the defendants required, and that the plaintiff gave, his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted, and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used. The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used; and upon this ground we agree that the rule should be discharged.”⁵⁸

Conclusion as to Effect of Misrepresentation.

From what has been shown, we may state the rule as to misrepresentations in this way: Whenever the validity of a contract is called in question, or the liabilities of the parties are said to be affected, by reason of representations made before or at the time of entering into the contract, the effect of the representation will depend on the answers to the following questions: (1) Were the statements in question a part of the terms of the contract? (2) If not, were they made fraudulently? (3) If neither of these, was the contract one of that class of contracts called “contracts uberrimæ fidei,” in which one of the parties had to rely peculiarly on the other for his knowledge of material facts, and the other was bound to the most perfect good faith? If all of these questions are answered in the negative, the representation has no effect at all.

Excepted Contracts Affected by Mere Misrepresentation.

To the general rule that misrepresentations not amounting to fraud, and not forming a term of the contract, do not affect its validity, there are exceptions in case of certain special contracts sometimes said to be *uberrimæ fidei*; that is, contracts of such a character that one of the parties must rely on the other for his knowledge of the facts. As the term implies, the most perfect good faith is required in such cases, and any material misstatement or concealment of facts, even though innocent, will avoid the contract.

Same—Contracts of Insurance.

Among these excepted contracts are contracts of insurance. In the case of a contract of marine insurance the assured is bound to give the insurer all such information as would be likely to affect his judgment in accepting the risk, and misrepresentation or nondis-

⁵⁸ *Bannerman v. White*, 10 C. B. (N. S.) 860.

closure of any such matter, though perfectly innocent, will vitiate the policy.⁶⁰ As said by the Ohio Court: "The assured is bound to communicate every material fact within his knowledge not known, or presumed to be known, to the underwriter, whether inquired for or not; and a failure in either particular, although it might have arisen from mistake, accident, or forgetfulness, is attended with the rigorous consequence that the policy never attaches, and is void, for the reason that the risk assumed is not the one intended to be assumed by the parties."⁶⁰ Thus, a policy of marine insurance has been avoided because the goods were insured for an amount considerably in excess of their value, though the fact of overvaluation did not affect the risks of the voyage, simply because the valuation is a fact usually taken into consideration by underwriters.⁶¹

It is said that the doctrine applicable to marine insurance does not apply, to the full extent, to other contracts of insurance.⁶² It is settled, however, that any false representation of a material fact, however innocently made, will avoid the policy.⁶³ It has even been held, in cases where the fact undisclosed was peculiarly within the knowledge of the insured, and not such as to be patent on examination, that the innocent nondisclosure of a material fact will vitiate the policy. Where, for instance, one fire insurance company reinsured a risk in another company without informing the latter that it had heard that the assured, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured, it was held that such nondisclosure, though unintentional, vitiated the contract of reinsurance.⁶⁴ Where, however, as is now generally the practice, written applications for insurance are required, in which specific questions are asked and answered, an innocent failure to disclose facts about which no inquiry is made will not avoid

⁶⁰ *McLanahan v. Insurance Co.*, 1 Pet. 170, 7 L. Ed. 98; *Lewis v. Insurance Co.*, 10 Gray (Mass.) 508; *Ely v. Hallett*, 2 Caines (N. Y.) 57; *Stoney v. Insurance Co.*, Harp. (S. C.) 235; *Lexington Fire, Life & Marine Ins. Co. v. Payer*, 16 Ohio, 324; *Vale v. Insurance Co.*, 1 Wash. C. C. 283, Fed. Cas. No. 16,811; *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348.

⁶⁰ *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, at page 462, 59 Am. Dec. 684.

⁶¹ *Ionides v. Pender*, L. R. 9 Q. B. 537.

⁶² *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St., at page 463, 59 Am. Dec. 684. And see *Burritt v. Insurance Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Wineland v. Insurance Co.*, 53 Md. 276; *United States Fire & Marine Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325.

⁶³ *Armour v. Insurance Co.*, 90 N. Y. 450.

⁶⁴ *New York Bowery Fire Ins. Co. v. Insurance Co.*, 17 Wend. (N. Y.) 359. And see *WALDEN v. INSURANCE CO.*, 12 La. 134, 32 Am. Dec. 116; *Curry v. Insurance Co.*, 10 Pick. (Mass.) 535, 20 Am. Dec. 547; *Fowler v. Insurance Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; *Bobbitt v. Insurance Co.*, 66 N. C. 70, 8 Am. Rep. 494.

the policy, though it is otherwise where there is an innocent failure to disclose a fact where inquiry is made.⁶⁵

In England and in some of our states a distinction has been drawn between life insurance and marine and fire insurance, and life insurance has been said not to be within the exception to the rule that innocent misrepresentation does not avoid a contract.⁶⁶ In most of our states, however, no distinction is made in this respect between life and fire insurance, misrepresentation of a material fact, whether innocent or fraudulent, avoiding the policy.⁶⁷

Even in England the tendency of the modern adjudications is towards applying the doctrine that innocent misrepresentation, including non-disclosure, vitiates a contract of fire or life, as well as marine, insurance, without any practical distinction.⁶⁸

Same—Contracts for the Sale of Land.

It is said by Sir William Anson that contracts for the sale of land are *uberrimæ fidei*, and therefore within the exception to the rule that innocent misrepresentation does not affect the validity of the contract; but this is so only to a very limited extent, even in England,⁶⁹ and probably to a less extent in this country. As a rule, the courts of law with us recognize no distinction in this respect between contracts for the sale of land and other contracts.⁷⁰ A purchaser of land, it has been held, is not bound to disclose facts within his knowledge which render the land worth much more than the price he offers; as, for instance, the fact that there is a valuable mine under it.⁷¹ It has, however, been held that a misdescription of the land, or of the title, or of the terms to which it is subject, though made without any fraudulent intention,

⁶⁵ *Green v. Insurance Co.*, 10 Pick. (Mass.) 402; *Com. v. Insurance Co.*, 112 Mass. 136, 17 Am. Rep. 72; *Washington Mills Mfg. Co. v. Insurance Co.*, 135 Mass. 505; *Burritt v. Insurance Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Browning v. Insurance Co.*, 71 N. Y. 508, 27 Am. Rep. 86; *North American Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638; *Clark v. Insurance Co.*, 8 How. 249, 12 L. Ed. 1061; *Ripley v. Insurance Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Short v. Insurance Co.*, 90 N. Y. 16, 43 Am. Rep. 138.

⁶⁶ *Whulton v. Hardesty*, 8 El. & Bl., at page 299; *Schwarzbach v. Protective Union*, 25 W. Va. 655, 52 Am. Rep. 227.

⁶⁷ *Bliss, Ins.* 75; *Vose v. Insurance Co.*, 6 Cush. (Mass.) 42; *Campbell v. Insurance Co.*, 98 Mass. 381, at page 396; *Goucher v. Association (C. C.)* 20 Fed. 596; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934; *Mutual Ben. Life Ins. Co. v. Wise*, 34 Md. 582; *Ætna Life Ins. Co. v. France*, 91 U. S. 512, 23 L. Ed. 401. See *PHŒNIX MUT. LIFE INS. CO. v. RADDIN*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; *Cable v. Insurance Co.*, 111 Fed. 19, 49 C. C. A. 216.

⁶⁸ *London Assurance v. Mansel*, 41 Law T. (N. S.) 225.

⁶⁹ 2 Add. Cont. § 538; 1 Sugd. Vend. 8.

⁷⁰ *Livingston v. Iron Co.*, 2 Paige, Ch. (N. Y.) 392; *Williams v. Spurr*, 24 Mich. 335.

⁷¹ Note 91, *infra*.

will avoid the contract.⁷² Courts of equity have granted or refused their peculiar remedies in the case of contracts for the sale of land because of innocent misrepresentation,⁷³ but this has been because of principles peculiar to equity, and not because of the nature of the contract. The same principles have been applied, and the same relief granted or refused, in the case of other contracts.

Same—Contracts to Purchase Shares in Companies.

Another exception is in the case of contracts with the promoters of a corporation for the purchase of shares. It is said in an English case: "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares."⁷⁴ As said in a New York case, the promoters of a corporation occupy before its organization a position of trust and confidence towards those whom they seek to induce to invest in the enterprise.⁷⁵

Same—Confidential Relations in General.

All contracts, whatever may be the subject-matter, are *uberrimæ fidei*, where the parties occupy a confidential relation towards each other, as in the case of contracts between an attorney and his client, a principal and his agent, a trustee and his cestui que trust, a guardian and his ward, a parent and his child, etc. The parties in such a case do not stand on equal ground; one of them reposes confidence in the other, and the latter, in dealing with the former, is held to the utmost good faith, and can gain no advantage by his dealings. Any misrepresen-

⁷² *Flight v. Booth*, 1 Bing. N. C. 370; *Jones v. Edney*, 3 Camp. 285; *In re Fawcett & Holmes*, 42 Ch. Div. 156; *Rayner v. Wilson*, 43 Md. 440; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178; *Munroe v. Pritchett*, 16 Ala. 785, 50 Am. Dec. 203; *Rimer v. Dugan*, 39 Miss. 477, 77 Am. Dec. 687; *Tyson v. Passmore*, 2 Pa. 122, 44 Am. Dec. 181; *Keating v. Price*, 58 Md. 532, at page 536; *Gunby v. Sluter*, 44 Md. 237; *Foley v. Crow*, 37 Md. 51; *Mitchell v. McDougall*, 62 Ill. 498; *Baughman v. Gould*, 45 Mich. 481, 8 N. W. 73; *Smith v. Richards*, 13 Pet. 26, 10 L. Ed. 42; *Mulvey v. King*, 39 Ohio St. 491.

⁷³ *Price v. McCauley*, 19 Eng. Law & Eq. 162; *O'Rourke v. Percival*, 2 Ball & B. 58; *Brooks v. Hamilton*, 15 Minn. 26 (Gil. 10); *Mohler v. Carder*, 73 Iowa, 582, 35 N. W. 647; *Watson v. Baker*, 71 Tex. 739, 9 S. W. 867.

⁷⁴ *New Brunswick & C. R. Co. v. Muggeridge*, 1 Drew. & S. 381. And see *Venezuela R. Co. v. Kisch*, L. R. 2 H. L. 113; *Peck v. Gurney*, L. R. 6 H. L. 403.

⁷⁵ *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498.

tation or nondisclosure of material facts will vitiate a contract between them.⁷⁶ All the exceptions to the rule that innocent misrepresentation does not avoid a contract are based on the fact that a relation of confidence exists between the parties.⁷⁷

Same—Contracts of Suretyship.

The contract of suretyship has sometimes been treated as being within this excepted class of contracts, but as regards the formation of the contract it is not really so. To vitiate such a contract the misrepresentation or nondisclosure must amount to fraud; but we shall see, in treating of fraud, that nondisclosure of facts which there is a duty to disclose is sometimes regarded as fraud, without regard to the question of motive or design.⁷⁸ Where the contract of suretyship has once been formed, the surety is entitled to be informed of any agreement between the creditor and the debtor which alters their relations, or any circumstance which would give him a right to avoid the contract.⁷⁹ Failure of the creditor to give such information does not affect the formation of the contract, but merely discharges the surety from any further liability, and therefore the question has nothing to do with our present discussion.

Agent's Warranty of Authority.

To the rule that an innocent misrepresentation has no effect upon the liabilities of the parties another exception must be noted. A person who contracts as agent in effect represents that he has the authority of his principal, and if the representation is untrue he is liable to the other party for any resulting loss, even if he acted in good faith and in the belief that he had authority. By a fiction, the professed agent is deemed to warrant his authority.⁸⁰

Effect in Equity.

This rule as to the effect of misrepresentations is not adhered to in courts of equity. A false statement made by one of the parties to the

⁷⁶ *Brooks v. Martin*, 2 Wall. 70, at page 84. 17 L. Ed. 732; *Baker v. Humphrey*, 101 U. S. 494, at page 502, 25 L. Ed. 1065; *James v. Steere*, 16 R. I. 367, 16 Atl. 143, 2 L. R. A. 164; *Smith v. Davis*, 49 Md. 470; *McConkey v. Cockey*, 69 Md. 286, 14 Atl. 465; *Reed v. Peterson*, 91 Ill. 288; *Ward v. Armstrong*, 84 Ill. 151; *Zeigler v. Hughes*, 55 Ill. 288; *Norris v. Tayloe*, 49 Ill. 17, 95 Am. Dec. 568; *Casey v. Casey*, 14 Ill. 112; note 227, *infra*.

⁷⁷ 2 Pom. Eq. Jur. § 902.

⁷⁸ *North British Ins. Co. v. Lloyd*, 10 Exch. 523; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231; *Hamilton v. Watson*, 12 Clark & F. 109; *Guardian Fire & Life Assur. Co. v. Thompson*, 68 Cal. 208, 9 Pac. 1; post, p. 221.

⁷⁹ *Phillips v. Foxall*, L. R. 7 Q. B. 666; *Roberts v. Donovan*, 70 Cal. 108, 11 Pac. 599; *Evans v. Kneeland*, 9 Ala. 42. But see *Atlantic & P. Telegraph Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621; *Jones v. U. S.*, 18 Wall. 662, 21 L. Ed. 867.

⁸⁰ Post, p. 518.

other has been held sufficient ground for refusing specific performance of the contract, though there was no fraud, and the statement was not a term in the contract;⁸¹ and a false representation believed to be true at the time it was made, and which was no part of the contract, has been held sufficient ground for setting the contract aside.⁸²

We have seen that the tendency of the common-law courts is to bring any statement which is material enough to affect consent, if possible, into the terms of the contract.⁸³ Where the statement or representation is of this character—that is, where it is a “vital condition”—equity, says Sir William Anson, will give “the same relief, but upon a different and more intelligible principle.” In equity an innocent misrepresentation, if it furnishes a material inducement, gives a right to avoid or rescind a contract where capable of rescission.⁸⁴

Same—Equitable Estoppel.

A representation by a party to a contract, relied upon by the other, may, in equity, create an estoppel against him. This is variously termed an “estoppel by conduct,” or an “estoppel in pais,” or an “equitable estoppel.” Thus, in a suit based on a promise to make a provision by will in consideration of marriage, the chancellor, while admitting that the transaction amounted to a contract, based his decision on “this larger principle: that where a man makes a representation to another, in consequence of which that other alters his position, or is induced to do any other act which is either permitted or sanctioned by the person making the representation, the latter cannot withdraw from the representation, but is bound by it conclusively.”⁸⁵

⁸¹ *Lamare v. Dixon*, L. R. 6 H. L. 414, at page 428.

⁸² *Trail v. Baring*, 4 De Gex, J. & S. 318. 33 L. J. Ch. 521; *Redgrave v. Hurd*, 20 Ch. Div. 13; *Newbigging v. Adam*, 34 Ch. Div. 582; *Brooks v. Hamilton*, 15 Minn. 26 (Gil. 10); *Smith v. Richards*, 13 Pet. 26, 36, 10 L. Ed. 42; *Cowley v. Smyth*, 46 N. J. Law. 380, 50 Am. Rep. 432; *Florida v. Morrison*, 44 Mo. App. 529; *Alker v. Alker* (Sup.) 12 N. Y. Supp. 676; *Joice v. Taylor*, 6 Gill & J. (Md.) 54, 25 Am. Dec. 325; *Taymon v. Mitchell*, 1 Md. Ch. 497; *Kent v. Carcaud*, 17 Md. 299; *Keating v. Price*, 58 Md. 532; *Thompson v. Lee*, 31 Ala. 292; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *WILCOX v. UNIVERSITY*, 32 Iowa, 367; *Allen v. Hart*, 72 Ill. 104; *Twitcomb v. Bridge*, 42 Vt. 68; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Bankhead v. Alloway*, 6 Cold. (Tenn.) 56; *Foard v. McComb*, 12 Bush (Ky.) 723. But see *Tone v. Wilson*, 81 Ill. 529; *Groff v. Rohrer*, 35 Md. 327.

⁸³ Ante, p. 209.

⁸⁴ *Anson. Contr.* (8th Ed.) 155, 156, citing *Derry v. Peak*, 14 App. Cas. 347; *Newbigging v. Adam*, 34 Ch. Div. 582; *Kennedy v. Panama, etc., Co.*, L. R. 2 Q. B. 580.

⁸⁵ *Coverdale v. Eastwood*, L. R. 15 Eq. 121. And see *Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550; *Thrall v. Thrall*, 60 Wis. 503, 19 N. W. 353; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 64 Am. Dec. 773; *Com. v. Moltz*, 10 Pa. 527, 51 Am. Dec. 499; *Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371; *Seudder v. Carter*, 43 Ill. App. 252; *STEVENS v. LUDLUM*, 46 Minn. 160,

What Amounts to a Representation.

In speaking of representations in entering into contracts of insurance, Mr. Justice Story said: "To constitute a representation, there should be an explicit affirmation or denial of a fact,—of such an allegation as would irresistibly lead the mind to the same conclusion. If the expressions are ambiguous, or such as the parties might fairly use without intending to authorize a particular conclusion, the assured ought not to be bound by the conjectures, or calculations of probability, of the underwriter."⁸⁶

A mere statement or expression of opinion or statement of intention will not amount to a representation, the falsity of which will avoid a contract.⁸⁷ Thus, in a contract of marine insurance, the assured communicated to the insurer a letter from the master of his vessel, stating that, in his opinion, the anchorage of the place to which the vessel was bound was safe. The vessel was lost there, but the court held that the assured, in reading the master's letter to the insurers, communicated to them all that he himself knew of the voyage, and that the expressions contained in the letter were not a representation of fact, but an opinion which the insurers could act upon or not, as they pleased.⁸⁸ Nor are commendatory expressions, such as men habitually use in order to induce others to enter into a bargain, regarded as representations of fact.⁸⁹ The misrepresentation, to be effective at all in avoidance of the contract, must have been relied upon by the other party, and have induced him to enter into the contract, or, rather, it must have been one of the inducements.⁹⁰ This will be more fully considered in treating of fraud.

48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210; *Dickerson v. Colgrove*, 100 U. S. 578, 580, 25 L. Ed. 618; *The Ottumwa Belle* (D. C.) 78 Fed. 643.

⁸⁶ *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506, 541, 3 L. Ed. 421.

⁸⁷ *Dowdall v. Cannady*, 32 Ill. App. 207; *Bryant v. Ocean Ins. Co.*, 22 Pick. (Mass.) 200; *Rice v. Insurance Co.*, 4 Pick. (Mass.) 439; *Allegre's Adm'r's v. Insurance Co.*, 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; *Fosdick v. Insurance Co.*, 3 Day (Conn.) 108; *Dennison v. Insurance Co.*, 20 Me. 125, 37 Am. Dec. 42; *Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800.

⁸⁸ *Anderson v. Insurance Co.*, L. R. 7 C. P. 65.

⁸⁹ A statement by an auctioneer that land which he offered for sale was "very fertile and improvable," whereas, in fact, it was in part abandoned as useless, was held to be "a mere flourishing description by an auctioneer," and not such a representation as would avoid the sale. *Dimmock v. Hallett*, L. R. 2 Ch. 21, 27. But on the sale of an hotel it was held that the contract was avoided by a false statement that the present lessee was "a most desirable tenant." *Smith v. Property Co.*, 28 Ch. Div. 7. And see *Tuck v. Downing*, 76 Ill. 71. See, also, *post*, p. 227.

⁹⁰ *Tuck v. Downing*, 76 Ill. 71; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Slaughter v. Gerson*, 13 Wall. 379, 20 L. Ed. 627; *post*, p. 232.

FRAUD.

- 139. Fraud is a false representation of a material fact, or nondisclosure of a material fact under such circumstances that it amounts to a false representation, made with knowledge of its falsity, or in reckless disregard of whether it is true or false, or as of personal knowledge, with the intention that it shall be acted upon by the other party, and which is acted upon by him to his injury. In detail:**
- (a) There must, as a rule, be a false representation, and not a mere nondisclosure; but nondisclosure or concealment is equivalent to a false representation—
 - (1) Where active steps are taken to prevent discovery of the truth.
 - (2) Where, though the representation made is true as far as it goes, the suppression of facts renders it in fact untrue.
 - (3) Where, under the circumstances, there is a duty to disclose the facts suppressed, so that failure to disclose them is an implied representation that they do not exist.
 - (b) The representation must be of a past or existing fact; and therefore fraud cannot result from—
 - (1) Expressions of opinion, belief, or expectation.
 - (2) Promises or expressions of intention. A representation, however, that a certain intention exists, when it does not exist, is a false representation of an existing fact.
 - (3) Representations as to the law, as a rule.
 - (c) The representation must be of a material fact.
 - (d) The representation must be of such a character, or must be made under such circumstances, that the other party has a right to rely on it. Fraud, therefore, cannot be predicated upon—
 - (1) Commendatory expressions as to value, prospects, and the like.
 - (2) False representations in cases where the means of knowledge are at hand, but the other party does not use them (in some jurisdictions).
 - (e) The representation must be made with knowledge of its falsity. It is regarded as “knowingly” false—
 - (1) If actually known to be false.
 - (2) If made in reckless disregard of whether it is true or false.
 - (3) If the fact is susceptible of knowledge, and the representation is made as of the party’s personal knowledge (in most jurisdictions).
 - (f) The representation need not be made directly to the other party, but it must be intended to reach him, and to be acted upon by him.
 - (g) The representation must deceive; that is, it must be relied upon by the other party, and must induce him to act.
 - (h) It must result in injury.

Fraud is a False Representation.

Subject to exceptions to be presently explained, a mere nondisclosure of fact, without more, is not fraud, whatever the intention may be. There must be some active attempt to deceive, either by a statement

which is false, or by a representation, true as far as it goes, but accompanied with such a suppression of facts as to make it convey a false impression, or else there must be a concealment of facts which the party is under a duty to disclose.

Mere silence or nondisclosure of facts may be such a misrepresentation as will avoid a contract *uberrimæ fidei*, but otherwise it generally has no effect, whatever may be the intention in failing to make the disclosure. Nondisclosure, even with intent to deceive, does not amount to a fraud which will render a contract voidable, or sustain an action for deceit, unless there is active concealment or a suppression of facts which there is a duty to disclose.⁹¹ For instance, in an English case, where the defendant had let to the plaintiff a house which he knew was required for immediate occupation, without disclosing that it was in a ruinous condition and unfit for habitation, it was held that an action for fraud would not lie. "It is not pretended," it was said, "that there was any warranty, express or implied, that the house was fit for immediate occupation; but it is said that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do what any man in his senses would do, viz. make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit."⁹²

The fact that the purchaser of goods fails to disclose the fact that he is insolvent does not amount to fraud if he intends to pay for them, and is not asked as to his financial condition.⁹³ If, however, at the

⁹¹ *Peek v. Gurney*, L. R. 6 H. L. 403; *Dambmann v. Schulting*, 75 N. Y. 55; *People's Bank of City of New York v. Bogart*, 81 N. Y. 103, 37 Am. Rep. 481; *Hadley v. Importing Co.*, 13 Ohio St. 502, 82 Am. Dec. 454; *Rison v. Newberry*, 90 Va. 513, 18 S. E. 916; *LAIDLAW v. ORGAN*, 2 Wheat. 178, 4 L. Ed. 214; *Williams v. Spurr*, 24 Mich. 335; *Crowell v. Jackson*, 53 N. J. Law, 656, 23 Atl. 426; *Cleaveland v. Richardson*, 132 U. S. 318, 10 Sup. Ct. 100, 33 L. Ed. 384; *Cochrane v. Halsey*, 25 Minn. 52; *West v. Anderson*, 9 Conn. 107, 21 Am. Dec. 737; *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448; *Coddington v. Goddard*, 16 Gray (Mass.) 463. Failure of the purchaser of land to disclose to the vendor the fact that there is mineral under it does not amount to fraud. *Harris v. Tyson*, 24 Pa. 347, 64 Am. Dec. 661; *Butler's Appeal*, 26 Pa. 63; *Smith v. Beatty*, 37 N. C. 456, 40 Am. Dec. 435. See, also, as to concealment by purchaser, *Neill v. Shamburg*, 158 Pa. 263, 27 Atl. 992; ante, p. 217, note 78.

⁹² *Keates v. Lord Cadogan*, 10 C. B. 591. See, also, *Fisher v. Lighthall*, 4 Mackey (D. C.) 82; *Lucas v. Coulter*, 104 Ind. 81, 3 N. E. 622; *Foster v. Peyser*, 9 Cush. (Mass.) 242, 57 Am. Dec. 43.

⁹³ *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501; *Powell v. Bradley*, 9 Gill & J. (Md.) 220; *Morrill v. Blackman*, 42 Conn. 324; *Zucker v.*

time of the purchase, he does not intend to pay, he is guilty of fraud, for he impliedly represents that he does intend to pay;⁹⁴ and it has been held by a number of courts that, if he has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay.⁹⁵

Active efforts to conceal a fact—as, for instance, where obstacles are thrown in the way to prevent the other party's inquiries from resulting in its discovery, or his attention is diverted for such a purpose—are equivalent to a false representation.⁹⁶ So, also, if a person makes a representation as to facts which is true as far as it goes, but intentionally suppresses other facts so as to make the representation convey a false impression, this is a false representation, and not a mere non-disclosure. The concealment or withholding of that which is not stated makes that which is stated absolutely false.⁹⁷

Karpeles, 88 Mich. 413, 50 N. W. 373; Hotchkiss v. Bank, 127 N. Y. 329, 27 N. E. 1050; Le Grand v. Bank, 81 Ala. 123, 1 South. 460, 60 Am. Rep. 140; Reticker v. Katzenstein, 26 Ill. App. 33; Bidault v. Wales, 20 Mo. 546, 64 Am. Dec. 205; Wilson v. White, 80 N. C. 280.

⁹⁴ Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Stewart v. Emerson, 52 N. H. 301; Donaldson v. Farwell, 93 U. S. 633, 23 L. Ed. 993; Ex parte Whittaker, 10 Ch. App. 446; Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366; Belding Bros. & Co. v. Frankland, 8 Lea (Tenn.) 67, 41 Am. Rep. 630; Harris v. Alcock, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158; Wilmot v. Lyon, 49 Ohio St. 296, 34 N. E. 720; Nichols v. McMichael, 23 N. Y. 266; Farwell v. Hanchett, 120 Ill. 573, 11 N. E. 875; Brower v. Goodyer, 88 Ind. 572; Ross v. Miner, 64 Mich. 204, 31 N. W. 185; Id., 67 Mich. 410, 35 N. W. 60; Ayres v. French, 41 Conn. 142; Jordan v. Osgood, 109 Mass. 457, 12 Am. Rep. 731; Dow v. Sanborn, 3 Allen (Mass.) 181; Yeager Milling Co. v. Lawler, 39 La. Ann. 572, 2 South. 398; Allen v. Hartfield, 76 Ill. 358; Devoe v. Brandt, 53 N. Y. 462; Hennequin v. Naylor, 24 N. Y. 139; Carnahan v. Bailey (C. C.) 28 Fed. 519; Fechheimer v. Baum, 37 Fed. 167, 2 L. R. A. 153; Shipman v. Seymour, 40 Mich. 274; Wright v. Brown, 67 N. Y. 1; Bidault v. Wales, 20 Mo. 546, 64 Am. Dec. 205; Des Farges v. Pugh, 93 N. C. 31, 53 Am. Rep. 446. There are a few decisions to the contrary. Smith v. Smith, 21 Pa. 367, 60 Am. Dec. 51; Bughman v. Bank, 159 Pa. 94, 28 Atl. 209; Bell v. Ellis, 33 Cal. 620.

⁹⁵ Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Jaffrey v. Brown (C. C.) 29 Fed. 476; Elsass v. Harrington, 28 Mo. App. 300; Whittin v. Fitzwater, 129 N. Y. 626, 29 N. E. 298; Dalton v. Thurston, 15 R. I. 418, 7 Atl. 112, 2 Am. St. Rep. 905. But see, contra, Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Biggs v. Barry, 2 Curt. 259, Fed. Cas. No. 1,402; Burrill v. Stevens, 73 Me. 395, 40 Am. Rep. 366. It has even been held that the fact of insolvency and concealment is sufficient to take the case to the jury on the question of intention not to pay. Edson v. Hudson, 83 Mich. 450, 47 N. W. 347; Slagle & Co. v. Goodnow, 45 Minn. 531, 48 N. W. 402.

⁹⁶ Croyle v. Moses, 90 Pa. 250; Matthews v. Bliss, 22 Pick. (Mass.) 48; Firestone v. Werner, 1 Ind. App. 293, 27 N. E. 623; Kenner v. Harding, 85 Ill. 265, 28 Am. Rep. 615; Kohl v. Lindley, 39 Ill. 195, 201, 89 Am. Dec. 294; Cogel v. Kniseley, 89 Ill. 598, 601; Roseman v. Canovan, 43 Cal. 110.

⁹⁷ Mallory v. Leach, 35 Vt. 156; Hadley v. Clinton Imp. Co., 13 Ohio St. 502; Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088, 25 Am. St. Rep. 503; Kidney v. Stoddard, 7 Metc. (Mass.) 252; Newell v. Randall, 32 Minn. 171, 19

Most exceptions to the rule that nondisclosure is not fraud lie in the distinction between mere silence where there is no duty to speak, and concealment of facts which are peculiarly within the knowledge of the party concealing them, and which, under the circumstances, he is bound in good faith to disclose. "In an action of deceit," it has been said by the supreme court of the United States, "it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment. '*Aliud est tacere, aliud celare*,'—a suppression of the truth may amount to a suggestion of falsehood. And if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, this is evidence of, and equivalent to, a false representation, because the concealment or suppression is, in effect, a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and, if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff." ⁹⁸

In contracts of sale, disclosure is not ordinarily incumbent on the

N. W. 972, 50 Am. Rep. 562; Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. Rep. 373. "If the presentation of that which is true creates an impression which is false, it is, as to him who, seeing the misapprehension, seeks to profit by it, a case of false representation." Lomerson v. Johnston, 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410. And see Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940; Howard v. Gould, 28 Vt. 523. 67 Am. Dec. 728; Baker v. Rockabrand, 118 Ill. 365, 8 N. E. 456.

⁹⁸ Stewart v. Cattle-Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439; LAIDLAW v. ORGAN, 2 Wheat. 178, 4 L. Ed. 214; Smith v. Countryman, 30 N. Y. 655; Griel v. Lomax, 89 Ala. 420, 6 South. 741; Loewer v. Harris, 6 C. C. A. 394, 57 Fed. 368; George v. Johnson, 6 Humph. (Tenn.) 36, 44 Am. Dec. 288; Beard v. Campbell, 2 A. K. Marsh. (Ky.) 125, 12 Am. Dec. 362; Peebles v. Stephens, 3 Bibb (Ky.) 324, 6 Am. Dec. 660; Waters v. Mattingley, 1 Bibb (Ky.) 244, 4 Am. Dec. 631; FISH v. CLELAND, 33 Ill. 237; Mitchell v. McDougall, 62 Ill. 498; Firestone v. Werner, 1 Ind. App. 293, 27 N. E. 623. A person taking a bond for the future good conduct of an agent already in his employment must communicate to a surety his knowledge of the past criminal conduct of such agent in the course of his past employment. The mere nondisclosure of such knowledge, irrespective of motive or design, is a fraud, which will invalidate the bond. Guardian Fire & Life Assur. Co. v. Thompson, 68 Cal. 208, 9 Pac. 1; State v. Sooy, 39 N. J. Law, 135; Dinsmore v. Tidball, 34 Ohio St. 418; Roberts v. Donovan, 70 Cal. 108, 11 Pac. 599. See ante, p. 217. A man may avoid his promise to marry a woman if she concealed from him the fact that she had previously given birth to a bastard child, or was of immoral character. Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329; Palmer v. Andrews, 7 Wend. (N. Y.) 143; Berry v. Bakeman, 44 Me. 164; Goodall v. Thurman, 1 Head (Tenn.) 208; Butler v. Eschleman, 18 Ill. 44; Capehart v. Carradine, 4 Strob. (S. C.) 42; post, p. 232.

seller. The rule is *caveat emptor*.⁹⁹ It has even been held that the seller is not bound to communicate the existence of a latent defect, such as a hidden disease of an animal, unless, by act or implication, he represents that such defects do not exist.¹⁰⁰ But it is generally held in this country that the intentional nondisclosure of such a defect by the seller, when he knows or has reason to know that it is unknown to the buyer, is fraudulent.¹⁰¹ So where premises leased are infected with a contagious disease, or otherwise subject to a nuisance which is prejudicial to life or health, it has been held that there is a duty to disclose the fact, and that concealment is a fraud.¹⁰²

Character of Representations—Opinion or Expectation.

To constitute fraud, the representation must be of a past or existing fact. What has been said in treating of misrepresentation is equally applicable here. A mere expression of opinion, belief, or expectation, however unfounded, will not invalidate a contract, nor give cause for an action for deceit.¹⁰³

If, for instance, the seller of property says it is worth so much, this is a mere expression of opinion upon which the buyer may or may

⁹⁹ *Smith v. Hughes*, L. R. 6 Q. B. 597; *LAIDLAW v. ORGAN*, 2 Wheat. 178, 4 L. Ed. 214; *People's Bank of City of New York v. Bogart*, 81 N. Y. 101, 37 Am. Rep. 481; *Kintzing v. McElrath*, 5 Pa. 467; *Cogel v. Kuiseley*, 89 Ill. 598.

¹⁰⁰ *Ward v. Hobbs*, 3 Q. B. Div. 150, 4 App. Cas. 13; *Beninger v. Corwin*, 24 N. J. Law, 257; *Paul v. Hadley*, 23 Barb. (N. Y.) 521; *Morris v. Thompson*, 85 Ill. 16.

¹⁰¹ *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Marsh v. Webber*, 13 Minn. 109 (Gil. 99); *Cecil v. Spurger*, 32 Mo. 462, 82 Am. Dec. 140; *Patterson v. Kirkland*, 34 Miss. 423; *Johnson v. Wallower*, 18 Minn. 288 (Gil. 262); *Cardwell v. McClelland*, 3 Sneed (Tenn.) 150; *Waters v. Mattingley*, 1 Bibb (Ky.) 244, 4 Am. Dec. 631; *Maynard v. Maynard*, 49 Vt. 297; *Paddock v. Strobbridge*, 29 Vt. 470; *Graham v. Stiles*, 38 Vt. 578; *Dowling v. Lawrence*, 58 Wis. 282, 16 N. W. 552. Sale of cattle known to be infected with contagious disease: *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 318, 28 Am. Dec. 476; *GRIGSBY v. STAPLETON*, 94 Mo. 423, 7 S. W. 421. The rule does not apply if the sale is "with all faults." *West v. Anderson*, 9 Conn. 107, 21 Am. Dec. 737; *Whitney v. Boardman*, 118 Mass. 242. Otherwise if seller makes efforts to prevent buyer from discovering defects. *West v. Anderson*, supra. Note 96, supra.

¹⁰² *Minor v. Sharon*, 112 Mass. 477, 17 Am. Rep. 122; *Cesar v. Karutz*, 60 N. Y. 229; *Cutler v. Hamlen* (Mass.) 18 N. E. 397.

¹⁰³ *Gordon v. Parmelee*, 2 Allen (Mass.) 212; *Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166; *Mooney v. Miller*, 102 Mass. 217; *Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105; *Allen v. Hart*, 72 Ill. 104; *Buschman v. Codd*, 52 Md. 207; *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166; *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271; *Montreal Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *SHELDON v. DAVIDSON*, 85 Wis. 138, 55 N. W. 161; *Nash v. Trust Co.*, 159 Mass. 437, 34 N. E. 625; *Reeves v. Corning* (C. C.) 51 Fed. 774.

not act, just as he chooses.¹⁰⁴ So, also, where a person makes a false representation as to the harvest which land sown in certain crops will produce,¹⁰⁵ or as to the cubic contents of a piece of grading which he employs another to do,¹⁰⁶ or as to what it will cost to build a house,¹⁰⁷ these are all mere expressions of opinion, and, as a rule, do not amount to fraud.¹⁰⁸

Same—Statement of Intention, Expectation, or Promises.

A representation of fact is a statement that a thing was or is, and does not, therefore, include expressions of intention or expectation, or promises, or other representations that a thing shall be.¹⁰⁹ Notwithstanding this, a representation of intention may amount to a fraudulent representation. The law makes a distinction between a promise which the promisor, when he makes it, intends to perform, and one which he intends to break. In the first case he represents truly enough his intention that something shall take place in the future, while in the second case he misrepresents his existing intention. He not merely makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be other than it really is.¹¹⁰ It is therefore, as we have already seen, very generally held that if a man buys

¹⁰⁴ *Lindsay Pet. Co. v. Hurd*, L. R. 5 P. C. 243; *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *Shank v. Whitney*, 66 Vt. 405, 29 Atl. 367; *Johnson v. Seymour*, 79 Mich. 156, 44 N. W. 344; *Geddes' Appeal*, 80 Pa. 442; *Doran v. Eaton*, 40 Minn. 35, 41 N. W. 244; *Belz v. Keller* (Ky.) 1 S. W. 420; *Noetling v. Wright*, 72 Ill. 390; *Lockwood v. Fitts*, 90 Ala. 150, 7 South. 467; *Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166; *Cagney v. Cuson*, 77 Ind. 494; *Lynch v. Murphy*, 171 Mass. 307, 50 N. E. 623.

¹⁰⁵ *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58.

¹⁰⁶ *East v. Worthington*, 88 Ala. 537, 7 South. 189.

¹⁰⁷ *Sweney v. Davidson*, 68 Iowa, 386, 27 N. W. 278.

¹⁰⁸ Representations as to the speed of a horse not made as of personal knowledge. *State v. Cass*, 52 N. J. Law, 77, 18 Atl. 972. Representation that a stallion will not produce sorrel colts. *Scroggin v. Wood*, 87 Iowa, 497, 54 N. W. 437. Representations as to solvency and credit. See *Homer v. Perkins*, 124 Mass. 431, 27 Am. Rep. 677; *Yeager Milling Co. v. Lawler*, 39 La. Ann. 572, 2 South. 398; *Childs v. Merrill*, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264. And see post, p. 226.

¹⁰⁹ *DAWE v. MORRIS*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Burrell's Case*, 1 Ch. Div. 552; *Knowlton v. Keenan*, 146 Mass. 86, 15 N. E. 127, 4 Am. St. Rep. 282; *Saunders v. McClintock*, 46 Mo. App. 216; *SHELDON v. DAVIDSON*, 85 Wis. 138, 55 N. W. 161; *Lawrence v. Gayetty*, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; *Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153; *Balance v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Birmingham Warehouse & Elevator Co. v. Land Co.*, 93 Ala. 549, 9 South. 235; *Huber v. Guggenheim (C. C.)* 89 Fed. 598. But see *Williams v. Kerr*, 152 Pa. 560, 25 Atl. 618; *Moore v. Cross* (Tex. Civ. App.) 26 S. W. 122. Representation that stock sold will pay a certain dividend. *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411.

¹¹⁰ *Old Colony Trust Co. v. Traction Co. (C. C.)* 89 Fed. 794; *Russ Lumber & Mill Co. v. Water Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

goods, not intending at the time to pay for them, he makes a fraudulent representation.¹¹¹

Same—Misrepresentation of Law.

As a rule, misrepresentation of law does not amount to a fraudulent representation for which an action of deceit will lie, nor make a contract voidable. A contract, therefore, cannot, unless there are peculiar circumstances of fraud, or a relation of trust and confidence between the parties,¹¹² be rescinded by one party on the ground that the other falsely represented the legal effect of the contract, or otherwise misrepresented the law.¹¹³ As already stated, private right of ownership, although it be the result also of a matter of law, is regarded as matter of fact, and ignorance of foreign laws, which include the laws of a sister state, is regarded as ignorance of fact, and misrepresentation in regard to either is misrepresentation of fact.¹¹⁴

Same—Materiality.

Not only must the representation be of a fact, but it must be of a material fact. A false representation of an immaterial fact, whatever may have been the intention, has no effect.¹¹⁵ It may often be difficult to say when a representation is material, but it is probably safe to say that it is always material if, had it been known to be false, the contract would not have been entered into.¹¹⁶

Right to Rely on Statements.

In order that a person may be entitled to rescind or maintain an action for deceit, the representations must have been of such a character, and

¹¹¹ Ante, p. 221.

¹¹² *Berry v. Whitney*, 40 Mich. 71; *Haviland v. Willets*, 141 N. Y. 35, 35 N. E. 958; *Motherway v. Wall*, 168 Mass. 333, 47 N. E. 135.

¹¹³ *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *FISH v. CLELAND*, 33 Ill. 238; *Wheaton v. Wheaton*, 9 Conn. 96; *Grant v. Grant*, 56 Me. 573; *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. Ed. 989; *Pinkham v. Gear*, 3 N. H. 163; *Clem v. Railroad Co.*, 9 Ind. 488, 68 Am. Dec. 653; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 293; *Townsend v. Cowles*, 31 Ala. 428; *Sims v. Ferrill*, 45 Ga. 585; *Starr v. Bennett*, 5 Hill (N. Y.) 303; *Moreland v. Atchison*, 19 Tex. 303; *People v. Supervisors*, 27 Cal. 655; *Dillman v. Nadleoffer*, 119 Ill. 567, 7 N. E. 88. But see *Underwood v. Brockman*, 4 Dana (Ky.) 309, 29 Am. Dec. 407; *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125; *Lowndes v. Chisolm*, 2 McCord, Eq. (S. C.) 455, 16 Am. Dec. 667. False representation by the lessor of property that the lessee will have the right to sell intoxicating liquors therein. *Gormely v. Association*, 55 Wis. 350, 13 N. W. 242.

¹¹⁴ Ante, p. 206.

¹¹⁵ *Young v. Young*, 113 Ill. 430; *DAWE v. MORRIS*, 149 Mass. 188, 21 N. E. 313, 4 L. R. A. 158, 14 Am. St. Rep. 404; *Geddes v. Pennington*, 5 Dow, 159; *Davis v. Davis*, 97 Mich. 419, 56 N. W. 774; *Nounnan v. Land Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; *Winston v. Young*, 52 Minn. 1, 53 N. W. 1015; *Palmer v. Bell*, 85 Me. 352, 27 Atl. 250; *Curtiss v. Howell*, 39 N. Y. 211.

¹¹⁶ *McAleer v. Horsey*, 35 Md. 439; *Powers v. Fowler*, 157 Mass. 318, 32 N.

must have been made under such circumstances, that he had a right to rely on them. Representations, for instance, amounting merely to commendatory expressions, or exaggerated statements as to value, or prospects, or the like, as where a seller puffs up the value and quality of his goods, or a man, to induce another to contract with him, holds out flattering prospects of gain, are not regarded as fraudulent.¹¹⁷ *Simplex commendatio non obligat*. As we have seen, the buyer of property is not justified in relying on the seller's representation as to its value.¹¹⁸ Some of the courts hold, however, that a statement by the seller of property that he gave so much for it is a representation of fact upon which the buyer may rely, and that, if it is knowingly false, it amounts to fraud.¹¹⁹ Other courts hold that such a statement is merely a commendatory expression, on which the buyer must not rely.¹²⁰ But, even where the statement would ordinarily be regarded as a mere commendatory expression¹²¹ or expression of opinion,¹²² the circumstances may be such as to justify the other party in relying on it, as, for instance, where the parties do not meet on equal terms by reason of the possession of special knowledge by the party making the statement, or there is a relation of confidence between them. In such a case the statement may be fraudulent.

E. 166; *Holst v. Stewart*, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442. Post, p. 232.

¹¹⁷ *Deming v. Darling*, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743; *Hughes v. Manufacturing Co.*, 34 Md. 318; *Kimball v. Bangs*, 144 Mass. 321, 11 N. E. 113; *Lockwood v. Pitts*, 90 Ala. 150, 7 South. 467; *Southern Development Co. v. Silva*, 125 U. S. 247, § Sup. Ct. 881, 31 L. Ed. 678; *Dillman v. Nadlehoffer*, 119 Ill. 567, 7 N. E. 88; *Jackson v. Collins*, 39 Mich. 557; *Burns v. Mahannah*, 39 Kan. 87, 17 Pac. 319; *Patten v. Glatz (C. C.)* 87 Fed. 283; *Macklem v. Fales*, 130 Mich. 66, 89 N. W. 581 (representations as to future possibilities). See the cases cited in notes 89, 103, *supra*.

¹¹⁸ Ante, p. 224.

¹¹⁹ *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Pendergast v. Reed*, 29 Md. 398, 96 Am. Dec. 539; *Salm v. Israel*, 74 Iowa, 314, 37 N. W. 387; *Weidner v. Phillips*, 39 Hun (N. Y.) 1; *Ives v. Carter*, 24 Conn. 392; *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475.

¹²⁰ *Tuck v. Downing*, 76 Ill. 71; *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726; *Cooper v. Lovering*, 106 Mass. 77; *Hemmer v. Cooper*, 8 Allen (Mass.) 334; *Bishop v. Small*, 63 Me. 12; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Sowers v. Parker*, 59 Kan. 12, 51 Pac. 888. See, also, *Cole v. Smith*, 26 Colo. 506, 58 Pac. 1086.

¹²¹ *Teachout v. Van Hoesen*, 76 Iowa, 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. Rep. 206; *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416; *Jackson v. Collins*, 39 Mich. 557; *Paetz v. Stoppleman*, 75 Wis. 510, 44 N. W. 834; *Chrysler v. Canada*, 90 N. Y. 272, 43 Am. Rep. 166; *Stoney Creek Woolen Co. v. Smalley*, 111 Mich. 321, 69 N. W. 722; *Horton v. Lee*, 106 Wis. 439, 82 N. W. 360.

¹²² *Hedin v. Institute*, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241; *Robbins v. Barton*, 50 Kan. 120, 31 Pac. 686; *Vilett v. Moler*, 82 Minn. 12, 84 N. W. 452.

Same—Credulity and Negligence of Party Defrauded.

It would seem upon principle that a person cannot avoid the effect of his fraudulent misrepresentation on the ground of the credulity of the injured party or of his negligence in failing to ascertain the facts, and many cases so hold.¹²³ Thus it is very generally held that a man may act upon a representation of fact, although means of obtaining knowledge are at hand and open to him.¹²⁴ "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement, and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract has deliberately pledged his faith."¹²⁵ On the other hand, by many courts it is laid down in broad terms that if the means of knowledge are at hand and equally available to both parties, and the subject of the contract is open to the inspection of both, the party to whom the representation is made will not be heard to say that he has been deceived thereby, if he has not availed himself of such means of knowledge.¹²⁶ This conflict of authority is illus-

¹²³ *Redgrave v. Hurd*, 20 Ch. Div. 1; *Jackson v. Collins*, 39 Mich. 557; *Kendall v. Wilson*, 41 Vt. 567; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832; *Linington v. Strong*, 107 Ill. 295; *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753, 18 Am. St. Rep. 549; *Warder, Bushnell & Glessner Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540; *Sutton v. Morgan*, 158 Pa. 204, 27 Atl. 894, 38 Am. St. Rep. 841; *McGibbons v. Wilder*, 78 Iowa, 531, 43 N. W. 520; *Erickson v. Fisher*, 51 Minn. 300, 53 N. W. 638; *Blacknall v. Rowland*, 108 N. C. 554, 13 S. E. 191; *Fargo Gas & Coke Co. v. Electric Co.*, 4 N. D. 219, 59 N. W. 1066, 37 L. R. A. 593; *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496; *Wilson v. Carpenter's Adm'r*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; *Strand v. Griffith*, 97 Fed. 854, 38 C. C. A. 444.

¹²⁴ *Gammill v. Johnson*, 47 Ark. 335, 1 S. W. 610; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056; *Hauseom v. Drullard*, 79 Cal. 234, 21 Pac. 736; *Clark v. Ralls* (Iowa) 24 N. W. 567; *Ledbetter v. Davis*, 121 Ind. 119, 22 N. E. 744; *Rohrof v. Schulte*, 154 Ind. 183, 55 N. E. 427; *Carpenter v. Wright*, 52 Kan. 221, 34 Pac. 798; *Wheeler v. Baars*, 33 Fla. 696, 15 South. 584; *Lovejoy v. Isbell*, 73 Conn. 368, 47 Atl. 682. Negligence is, of course, no defense, in the case of negotiable paper, against innocent purchasers. *Ante*, p. 198.

¹²⁵ *Mead v. Bunn*, 32 N. Y. 275. But see *Long v. Warren*, 68 N. Y. 426; *Schumaker v. Mather*, 133 N. Y. 590, 30 N. E. 755, 757.

¹²⁶ *Slaughter's Adm'r v. Gerson*, 13 Wall. 379, 20 L. Ed. 627; *Salem India-Rubber Co. v. Adams*, 23 Pick. (Mass.) 256, 265; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506; *Palmer v. Bell*, 85 Me. 352, 27 Atl. 250, 251; *Schumaker v. Mather*, 133 N. Y. 590, 30 N. E. 755, 757; *Washington Cent. Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *South Milwaukee Boulevard Heights Co. v. Harte*, 95 Wis. 592, 70 N. W. 21. See, also, *Hingston v. L. P. & J. A. Smith Co.*, 114 Fed. 294, 52 C. C. A. 206.

"The requirement, as it has been worked out, does not call for more than reasonable diligence (*Holst v. Stewart*, 161 Mass. 516, 522, 37 N. E. 755, 42 Am. St. Rep. 442; *Brown v. Leach*, 107 Mass. 364, 368; *Nowlan v. Cain*, 3

trated by the opposite decisions which have been reached in cases involving the liability of a person who has been fraudulently induced to execute an instrument upon misrepresentation of the other party as to its character or terms. Doubtless a person who fails to read an instrument before signing it is wanting in ordinary prudence, but it has been held by many courts that he is not precluded thereby from asserting the invalidity of the contract as against the party who has thus procured the execution by fraud.¹²⁷ By other courts it has been held that the party so signing is precluded by his negligence from asserting the invalidity of the contract.¹²⁸

Knowledge of Falsity—Recklessness.

A representation is fraudulent if it is made with knowledge of its falsity or without belief in its truth. The mere absence of belief is enough, and hence, if a man makes a misrepresentation in reckless disregard whether it is true or not, the representation is fraudulent, for he can have no belief in the truth of what he asserts.¹²⁹ And if a man

Allen [Mass.] 261, 264); and distance or other slight circumstances have been held sufficient to warrant leaving the question to the jury (*Holst v. Stewart*, 161 Mass. 516, 522, 523, 37 N. E. 755, 42 Am. St. Rep. 442). See *Burns v. Lane*, 138 Mass. 350, 355, 356; *Whiteside v. Brawley*, 152 Mass. 133, 24 N. E. 1088. The matter may have been confused a little by not distinguishing between sellers' talk as to the value and the like, where the rule is absolute in ordinary cases that the buyer must look out for himself, and representation of facts concerning which even sellers may be held liable for fraud, and as to which the buyers may be warranted in relying wholly on the seller's word. The notion that the buyer must look out for himself sometimes has been pressed a little too strongly into the latter class of cases." Per *Holmes, J.*, in *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262.

¹²⁷ *Alfred Shrimpton & Sons v. Philbrick*, 53 Minn. 366, 55 N. W. 551; *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; *Burroughs v. Guano Co.*, 81 Ala. 255, 1 South. 212; *Smith v. Smith*, 134 N. Y. 62, 31 N. E. 258, 30 Am. St. Rep. 617; *Kingman v. Reinemer*, 166 Ill. 208, 46 N. E. 786; *ALEXANDER v. BROGLEY*, 63 N. J. Law, 307, 43 Atl. 888; *Woodbridge v. De Witt*, 51 Neb. 98, 70 N. W. 506; *McBride v. Publishing Co.*, 102 Ga. 422, 30 S. E. 999. See, also, *Louisville & N. R. Co. v. Cooper (Ky.)* 56 S. W. 144; *Story v. Gammell (Neb.)* 94 N. W. 982.

¹²⁸ *Taylor v. Fleckenstein (C. C.)* 30 Fed. 99; *Keller v. Orr*, 106 Ind. 406, 7 N. E. 195; *Wallace v. Railway Co.*, 67 Iowa, 547, 25 N. W. 772; *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14; *Kimmell v. Skelly*, 130 Cal. 55, 62 Pac. 1067; *Binford v. Brusco*, 22 Ind. App. 512, 54 N. E. 146.

¹²⁹ Per *Lord Cairns*, in *Reese River Min. Co. v. Ayers*, 65 Ill. 142; *Stone v. Covell*, 29 Mich. 359; *Bristol v. Braidwood*, 28 Mich. 191; *Walsh v. Morse*, 80 Mo. 568; *Cotzhausen v. Simon*, 47 Wis. 103, 1 N. W. 473; *Indianapolis, P. & C. R. Co. v. Tyng*, 63 N. Y. 653; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Ruff v. Jarrett*, 94 Ill. 475; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct.

falsely asserts a fact as true of his own knowledge when he has no knowledge, it is none the less fraudulent because he believes it to be true. Probably it is the prevailing rule in this country that an unqualified statement of a material fact susceptible of actual knowledge is to be taken as a representation as of one's own knowledge, and that such a representation if false is fraudulent, notwithstanding belief in its truth.¹³⁰ In England, on the other hand, and in some states it is held that a statement made in the honest belief that it is true is not fraudulent, notwithstanding absence of reasonable grounds for believing it to be true.¹³¹ The absence of such grounds can only go to show that the belief was not entertained.¹³²

The fact that the party making the representation professed to rely on the representations of others, and gave the source of his information, is immaterial, if he knew, or had reason to believe, that they were untrue.¹³³

Intention.

The representation must have been made with the intention that it should be acted upon by the injured party.¹³⁴ Another statement of

360, 28 L. Ed. 382; *Bower v. Fenn*, 90 Pa. 359, 35 Am. Rep. 662; *Leavitt v. Sizer*, 35 Neb. 80, 52 N. W. 832; *Krause v. Busacker*, 105 Wis. 350, 81 N. W. 406.

¹³⁰ *Litchfield v. Hutchinson*, 117 Mass. 197; *CHATHAM FURNACE CO. v. MOFFATT*, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727 (Cf. *Goodwin v. Trust Co.*, 152 Mass. 189, 25 N. E. 100); *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. 139; *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. Rep. 485; *Montreal Lumber Co. v. Mibills*, 80 Wis. 540, 50 N. W. 507; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Knappen v. Freeman*, 47 Minn. 491, 50 N. W. 533; *State v. Cass*, 52 N. J. Law, 77, 18 Atl. 972; *Hamlin v. Abell*, 120 Mo. 188, 25 S. W. 516; *Rothschild v. Mack*, 115 N. Y. 1, 21 N. E. 726; *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Walters v. Eaves*, 105 Ga. 584, 32 S. E. 609; *Simon v. Rubber Shoe Co.*, 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745. The fraud in such a case "consists in stating that the party knows the thing to exist when he does not know it to exist; and, if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge." *CHATHAM FURNACE CO. v. MOFFATT*, *supra*. And see *Alvarez v. Brannan*, 7 Cal. 503, 68 Am. Dec. 274.

¹³¹ *Derry v. Peek*, 14 App. Cas. 337; *Merwin v. Arbuckle*, 81 Ill. 501; *Cox v. Highley*, 100 Pa. 249; *Lamberton v. Dunham*, 165 Pa. 129, 30 Atl. 716; *WILCOX v. UNIVERSITY*, 32 Iowa, 367; *Lord v. Goddard*, 13 How. 198, 14 L. Ed. 111; *Pettigrew v. Chellis*, 41 N. H. 95; *Scroggin v. Wood*, 87 Iowa, 497, 54 N. W. 437; *Sylvester v. Henrich*, 93 Iowa, 489, 61 N. W. 942; *Morton v. Scull*, 23 Ark. 289; *Farmers' Stock Breeding Ass'n v. Scott*, 53 Kan. 534, 36 Pac. 978.

¹³² *Anson*, Cont. (8th Ed.) 172.

¹³³ *Hanscom v. Drullard*, 79 Cal. 234, 21 Pac. 736.

¹³⁴ *Buschman v. Codd*, 52 Md. 202; *Humphrey v. Merriam*, 32 Minn. 197,

this rule is that the representation must be made as part of the same transaction.¹³⁵

The representation need not, indeed, have been made to the injured party himself. If a person, desiring to enter into a contract with another, should make a representation to a third person with the intention that it should reach the ears of such other person, and be acted upon by him, in entering into the contract, this would constitute a fraudulent misrepresentation equally as if it had been made to the other party.¹³⁶ Where a gun was sold to a man for the use of himself and sons, the seller falsely representing that it had been made by a certain maker, and was a good, safe, and secure gun, it was held that a son of the buyer who was injured by the gun's exploding could sue the seller for deceit. In that case it was argued that the defendant could not be held liable to the plaintiff for a representation not made to him; but the court held that inasmuch as the gun was sold to the father to be used by the plaintiff, and there was a false representation to effect the sale, and "as there was fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results," the defendant was liable.¹³⁷ So, also, where a merchant makes a false statement as to his financial responsibility to a mercantile agency for the purpose of procuring credit, and customers of the agency, in reliance thereon, give him credit, and are defrauded, they may maintain an action of deceit against him, or avoid their contract with him on the ground of fraud.¹³⁸

The representation, however, must have been made with the intention that it should be acted upon by the injured party in the manner that occasions the injury.¹³⁹ Thus, where the directors of a company made false statements in the prospectus of the company, which would have made them liable to the original allottees of shares, they were

20 N. W. 138; *Bach v. Tuck*, 57 Hun. 588, 10 N. Y. Supp. 884; *Carter v. Harden*, 78 Me. 528, 7 Atl. 392; *Thorp v. Smith*, 18 Wash. 277, 51 Pac. 381.

¹³⁵ *Pollock*, Cont. (3d Ed.) 545; *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733.

¹³⁶ *Langridge v. Levy*, 2 Mees. & W. 519; *Snow v. Judson*, 38 Barb. (N. Y.) 210; *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623; *Chubbuck v. Cleveland*, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864; *Waterbury v. Andrews*, 67 Mich. 281, 34 N. W. 575; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915.

¹³⁷ *Langridge v. Levy*, 2 Mees. & W. 519.

¹³⁸ *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 31, 38 Am. Rep. 389; *Mooney v. Davis*, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; *Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103; *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. 790; *Gainesville Nat. Bank v. Bramberger*, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738; *P. Cox Shoe Co. v. Adams*, 105 Iowa. 402, 75 N. W. 316. See, also, *STEVENS v. LUDLUM*, 46 Minn. 160, 48 N. W. 771, 13 L. R. A. 270, 24 Am. St. Rep. 210.

¹³⁹ *Barry v. Crosky*, 2 Johns. & H. 1.

held not to be liable to persons who subsequently purchased shares which came into the market, on the ground that their intention to deceive could not be supposed to extend beyond the original applicants for shares.¹⁴⁰ The directors in such a case would be liable to the original applicants for shares, relying on the prospectus.¹⁴¹

Same—Dishonesty of Motive.

If a person makes a representation which was fraudulent as has been above explained, it is immaterial that he may not have been actuated by any dishonest motive. If a man chooses to make such assertions, hoping or even believing that all will turn out well, he cannot escape the results of his fraud by showing the excellence of his motives.¹⁴² Thus, where a person accepted a bill of exchange drawn on another person, and falsely represented that he had authority from that other to do so, he was held liable in an action of deceit brought against him by an indorsee, the acceptance having been repudiated by the drawee and the bill dishonored; and the fact that the defendant honestly believed that the acceptance would be sanctioned by the drawee, and the bill paid, was held immaterial.¹⁴³

Representation must Deceive.

A false representation, to constitute fraud, must actually deceive; that is, it must be relied on by the other party, and must induce him to act to his prejudice. If it is not believed, or the party disregards it, and makes inquiries for himself, there is no fraud.¹⁴⁴ In a leading

¹⁴⁰ *Peek v. Gurney*, L. R. 6 H. L. 377, 410. And see *Nash v. Trust Co.*, 159 Mass. 437, 34 N. E. 625; *Davidson v. Nichols*, 11 Allen (Mass.) 514. It has been held that it could not be said, as a matter of law, that false representations concerning the value of certain stock, by which a person was induced to buy, may not have continued in his mind, and induced him to buy more of the stock a year later. *Reeve v. Dennett*, 145 Mass. 23, 11 N. E. 938.

¹⁴¹ *Reese River Min. Co. v. Smith*, 4 H. L. Cas. 64; *Vreeland v. Stone Co.*, 29 N. J. Eq. 188.

¹⁴² *Polhill v. Walter*, 3 Barn. & Adol. 114. A buyer of goods cannot avoid the effect of knowingly false statements as to his financial condition by showing that he intended and expected to pay for them. *Judd v. Weber*, 55 Conn. 267, 11 Atl. 40. See, also, ante, p. 221. Although the maker of the representation believes it to be true, if he discovers that it is false before it is acted on, and does not disclose the fact, he is guilty of fraud. *Loewer v. Harris*, 57 Fed. 368, 6 C. C. A. 394; *Guilford School Tp. v. Roberts*, 28 Ind. App. 355, 62 N. E. 711.

¹⁴³ *Polhill v. Walter*, 3 Barn. & Adol. 114.

¹⁴⁴ *Arkwright v. Newbold*, 17 Ch. Div. 324; *Ming v. Woolfolk*, 116 U. S. 599, 6 Sup. Ct. 489, 29 L. Ed. 740; *Humphrey v. Merriam*, 32 Minn. 197, 20 N. W. 138; *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98; *Runge v. Brown*, 23 Neb. 817, 37 N. W. 660; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Craig v. Hamilton*, 118 Ind. 565, 21 N. E. 315; *Priest v. White*, 89 Mo. 609, 1 S. W. 361; *Buschman v. Codd*, 52 Md. 202; *Farrar v. Churchill*, 135 U. S. 616, 10 Sup. Ct. 771, 34 L. Ed. 246; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W.

case on this subject it appeared that the defendant had bought a cannon from the plaintiff, having a defect in it which rendered it worthless, and the plaintiff had endeavored to conceal the defect by inserting a metal plug in the weak spot. The defendant never inspected the cannon. He accepted it, and, in using it, it burst. It was held that the attempted fraud, having had no operation upon the mind of the defendant, did not exonerate him from paying for the gun. "If," said the court, "the plug which it was said was put in to conceal the defect had never been there, his position would have been the same; for, as he did not examine the gun, or form any opinion as to whether it was sound, its condition did not affect him."¹⁴⁵ If the representation was one calculated to induce the other party to make the contract, the presumption is that he was influenced by it; and, in order to take away his right to relief on the ground of fraud, it must be shown that he did not rely on it.¹⁴⁶

The representation need not have been the sole inducement to enter into the contract. If it was a material inducement,—that is, if it so contributed as an inducement that without it the contract would not have been made,—it is sufficient.¹⁴⁷

Injury must Result.

It is essential, in order to sustain an action of deceit, or to give a party the right to avoid a contract on the ground of fraud, that he shall have been prejudiced or injured by the fraud.¹⁴⁸ Where, for instance, a person was induced to exchange his property for shares of stock by false representations of the other party, but the stock was worth what he gave for it, so that he suffered no injury, it was held that he could not maintain an action for deceit.¹⁴⁹ And, in a case in

915; *Cobb v. Wright*, 43 Minn. 83, 44 N. W. 662; *Wimer v. Smith*, 22 Or. 469, 30 Pac. 416; *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39; *Darby v. Kroell*, 92 Ala. 607, 8 South. 384; *Pratt v. Burhans*, 84 Mich. 487, 47 N. W. 1064, 22 Am. St. Rep. 703; *Fowler v. McCann*, 86 Wis. 427, 56 N. W. 1085; *Black v. Black*, 110 N. C. 398, 14 S. E. 971; *Dady v. Condit*, 163 Ill. 511, 45 N. E. 224; *Brady v. Evans*, 78 Fed. 558, 24 C. C. A. 236; *Wagner v. Insurance Co.*, 90 Fed. 395, 33 C. C. A. 121.

¹⁴⁵ *Horsfall v. Thomas*, 1 Hurl. & C. 90, 99.

¹⁴⁶ *Redgrave v. Hurd*, 20 Ch. Div. App. 21; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241; *Garrison v. Electrical Works*, 59 N. J. Eq. 440, 45 Atl. 612; *Dashiell v. Harshman*, 113 Iowa, 283, 85 N. W. 88.

¹⁴⁷ *Peek v. Derry*, 37 Ch. Div. 541, L. R. 14 App. Cas. 337; *Safford v. Grout*, 120 Mass. 20; *Burr v. Willson*, 22 Minn. 206; *Lebby v. Ahrens*, 26 S. C. 275, 2 S. E. 387; *Saunders v. McClintock*, 46 Mo. App. 216; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Ruff v. Jarrett*, 94 Ill. 475; *Moline-Milburn Co. v. Franklin*, 37 Minn. 187, 33 N. W. 323.

¹⁴⁸ *Schubart v. Coke Co.*, 41 Ill. App. 181; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386; *Lorenzen v. Investment Co.*, 44 Neb. 99, 62 N. W. 231; *Bomar v. Rosser*, 131 Ala. 215, 31 South. 430. But see *Northrop v. Hill*, 57 N. Y. 351, 15 Am. Rep. 501.

¹⁴⁹ *Alden v. Wright*, 47 Minn. 225, 49 N. W. 767, and cases there cited.

which the seller of property had falsely represented that there was no mortgage thereon, it was held that the purchaser could not avoid the sale, where the seller had the mortgage released as soon as his attention was called to it.¹⁵⁰

SAME—EFFECT—REMEDIES.

140. Fraud renders a contract, not void, but merely voidable at the option of the party injured. Therefore,

- (a) **He may affirm the contract, and sue for damages for the deceit, or, if sued on the contract, set up the fraud in reduction of the demand.**
- (b) **He may rescind the contract, and**
 - (1) **Sue for damages for the deceit;**
 - (2) **Sue to recover what he has parted with;**
 - (3) **Resist an action at law on the contract;**
 - (4) **Resist a suit in equity for specific performance, or**
 - (5) **Sue in equity to have the contract avoided judicially.**

141. There are the following limitations to a party's right to rescind a contract for fraud:

- (a) **He cannot rescind after affirming it by accepting its benefits, or by suing or otherwise acting upon it after discovery of the fraud.**
- (b) **Delay in rescinding after discovery of the fraud, or after it should have been discovered, may amount to an affirmation at law, and may bar relief in equity on the ground of laches.**
- (c) **The consideration must be returned as a condition precedent to the right to rescind; and, as a rule, there can be no rescission if the subject-matter of the contract has been so dealt with that the parties cannot be placed in statu quo.**

EXCEPTIONS—(1) This rule does not apply where the consideration has been destroyed, or taken from the injured party's control, without his fault.

- (2) **Where it is of no value whatever.**
- (3) **Provided the consideration is returned, the fraudulent party need not be placed in as good a position as he before occupied, if, by reason of his own act, it is impossible to do so.**
- (4) **If, by natural causes, or reasonable use, the value of the consideration has diminished, it may be returned in its depreciated condition.**
- (d) **The right to rescind may be defeated by a third person's having acquired an interest under the contract for value, and without notice of the fraud.**

Fraud does not render the contract void, but renders it only voidable at the option of the party defrauded.¹⁵¹ In other words, it is valid until rescinded. It is for the party defrauded to elect whether he will

¹⁵⁰ *Johnson v. Seymour*, 79 Mich. 156, 44 N. W. 344. And see *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271. Cf. *Stevenson v. Marble* (C. C.) 84 Fed. 23.

¹⁵¹ *Baird v. Mayor*, 96 N. Y. 567; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307,

be bound.¹⁵² He therefore has several remedies on discovering the fraud:

First. He may affirm the contract, and bring an action for deceit to recover such damages as the fraud has occasioned him, or set up such damages by way of recoupment or counterclaim, if sued upon the contract by the other party.¹⁵³ For instance, the defrauded buyer, on discovering the fraud, may keep the goods, and bring an action for damages;¹⁵⁴ or, if he has not paid for them, he may set up the fraud when sued by the seller for the price.¹⁵⁵

Second. He may rescind the contract, and (1) sue, in an action of deceit, for any damages he may have sustained by reason of the fraud;¹⁵⁶ or (2) if he has paid money under the contract, he may recover it back,¹⁵⁷ and if he has delivered goods or property he may maintain an action of replevin or trover;¹⁵⁸ or (3) he may resist an action at law brought against him on the contract;¹⁵⁹ or (4) he may resist a suit in equity by the other party for specific performance;¹⁶⁰ or (5) he may himself sue in equity to have the contract judicially canceled and set aside.¹⁶¹

23 Am. Dec. 607; *Smith v. Hornback*, 4 Litt. (Ky.) 232, 14 Am. Dec. 122; *Foreman v. Bigelow*, 4 Cliff. 541, Fed. Cas. No. 4,934; *Cobb v. Hatfield*, 46 N. Y. 533; *Wilson v. Hundley*, 96 Va. 96, 30 S. E. 492, 70 Am. St. Rep. 837.

¹⁵² *Rawlins v. Wickham*, 3 De Gex & J. 322; *Clough v. Railway Co.*, L. R. 7 Exch. 26; *Tiffany, Sales*, 119.

¹⁵³ *Union Cent. Life Ins. Co. v. Schidler*, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; *Peck v. Brewer*, 48 Ill. 54; *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612; *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380; *Barr v. Kimball*, 43 Neb. 766, 62 N. W. 196. But some cases hold that if, while the contract is still wholly or largely executory, the defrauded party learns of the fraud, and nevertheless continues to carry out the contract, exacting performance, and receiving benefits, he cannot maintain an action for the deceit. *Kingman & Co. v. Stoddard*, 85 Fed. 740, 29 C. C. A. 413; *Simon v. Rubber Shoe Co.*, 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745.

¹⁵⁴ *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 323.

¹⁵⁵ *Applegarth v. Robertson*, 35 Md. 493, 4 Atl. 896.

¹⁵⁶ *Wardell v. Fosdick*, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383; *Burns v. Dockray*, 156 Mass. 135, 30 N. E. 551; *Peck v. Brewer*, 48 Ill. 54.

¹⁵⁷ *Clarke v. Dickson*, El. Bl. & El. 148; *Coolidge v. Brigham*, 1 Mete. (Mass.) 547.

¹⁵⁸ *Thurston v. Blanchard*, 22 Pick. (Mass.) 18, 33 Am. Dec. 700; *FERGUSON v. CARRINGTON*, 9 Barn. & C. 59; *Lee v. Burnham*, 82 Wis. 209, 52 N. W. 255; *Moody v. Blake*, 117 Mass. 23, 19 Am. Rep. 394; *Cary v. Hotailing*, 1 Hill (N. Y.) 311, 37 Am. Dec. 323; *Benesch v. Weil*, 69 Md. 276, 14 Atl. 666; *Barker v. Dinsmore*, 72 Pa. 427, 13 Am. Rep. 697.

¹⁵⁹ *Clough v. Railway Co.*, L. R. 7 Exch. 26, 36.

¹⁶⁰ *Ratliff v. Vandikes*, 89 Va. 307, 15 S. E. 864; *Friend v. Lamb*, 152 Pa. 529, 25 Atl. 577, 34 Am. St. Rep. 672; *McShane v. Hazlehurst*, 50 Md. 107;

¹⁶¹ See note 161 on following page.

Limitations to Right to Rescind.

As a rule, the defrauded party must elect to rescind within a reasonable time after discovering the fraud,¹⁶² or, what amounts to the same thing, after he could have discovered it by the use of due diligence.¹⁶³ It has been said that mere lapse of time, in the absence of statutory regulation, will not bar his right to rescind, though it would be evidence tending to show an intention to affirm.¹⁶⁴ A delay in rescinding which is unreasonable in view of the particular circumstances, however, will generally be regarded, even at law, as an election to affirm,¹⁶⁵ and will bar relief in equity on the ground of laches.¹⁶⁶

Any acts which unequivocally treat the contract as subsisting will constitute an affirmation. If, after discovering the fraud, the party injured acts on the contract by accepting some benefit under it, or otherwise, he affirms it, and cannot afterwards rescind, for after an affirmation the election is determined.¹⁶⁷ Bringing an action on the con-

Chute v. Quincy, 156 Mass. 189, 30 N. E. 550; *Brown v. Pitcairn*, 148 Pa. 387, 24 Atl. 52, 33 Am. St. Rep. 834.

¹⁶¹ *Castle v. Kemp*, 124 Ill. 307, 16 N. E. 255; *Downing v. Wherrin*, 19 N. H. 9, 49 Am. Dec. 139; *Burrows v. Wene* (N. J. Ch.) 26 Atl. 890; *Williams v. Kerr*, 152 Pa. 560, 25 Atl. 618; *Jackson v. Hodges*, 24 Md. 468; *Tretheway v. Hulett*, 52 Minn. 448, 54 N. W. 486.

¹⁶² *Johnson v. McLane*, 7 Blackf. (Ind.) 501, 43 Am. Dec. 102; *Schiffer v. Dietz*, 83 N. Y. 300; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868; *Young v. Arntze*, 86 Ala. 116, 5 South. 253; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420; *Taylor v. Short*, 107 Mo. 384, 17 S. W. 970; *Rugan v. Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. 415; *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *Conlan v. Roemer*, 52 N. J. Law, 53, 18 Atl. 858; *Foley v. Crow*, 37 Md. 62; *Fleming v. Hanley*, 21 R. I. 141, 42 Atl. 520. Delay alone, without discovery of the fraud, will not bar the right to rescind. *Smith's Adm'r v. Smith*, 30 Vt. 139; *Brown v. Norman*, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663; *Bowman v. Patrick* (C. C.) 36 Fed. 138.

¹⁶³ *Redgrave v. Hurd*, 20 Ch. Div. 1; *Georgia Pac. R. Co. v. Brooks*, 66 Miss. 583, 6 South. 467; *Bostwick v. Insurance Co.*, 116 Wis. 392, 92 N. W. 246.

¹⁶⁴ *Anson*, Cont. (8th Ed.) 177; *Clough v. Railroad Co.*, L. R. 7 Exch. 35; *Wicks v. Smith*, 21 Kan. 412, 30 Am. Rep. 433.

¹⁶⁵ *Masson v. Bovet*, 1 Denio (N. Y.) 69, 43 Am. Dec. 651; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Carroll v. People*, 13 Ill. App. 206; note 162, supra.

¹⁶⁶ *Cox v. Montgomery*, 36 Ill. 396; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636; *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507; *Barnard v. Iron Co.*, 85 Tenn. 139, 2 S. W. 21; *Burkle v. Levy*, 70 Cal. 250, 11 Pac. 643; *Wilkinson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. 228; *Coles v. Vanneman*, 51 N. J. Eq. 323, 18 Atl. 468.

¹⁶⁷ *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Dennis v. Jones*, 44 N. J. Eq. 513, 14 Atl. 913, 6 Am. St. Rep. 899; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420; *Lockwood v. Fitts*, 90 Ala. 150, 7 South. 467; *Crooks v. Nippolt*, 44 Minn. 239, 46 N. W. 349; *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. 967; *Troup v. Appelman*, 52 Md. 456; *Wyeth v. Walzl*, 43 Md. 426; *Cobb v. Hatfield*, 46 N. Y. 533; *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785; *Bach v. Tuch*, 126 N. Y. 53, 26 N. E. 1019.

tract, or otherwise seeking to enforce it, after knowledge of the fraud, is an affirmance.¹⁶⁸ It is otherwise if an action is brought, or the contract otherwise acted upon, in ignorance of the fraud.¹⁶⁹ As already stated, an affirmance of the contract is no bar to an action to recover damages for the deceit.¹⁷⁰

Return of Consideration—Placing in Statu Quo.

The contract must be rescinded in toto; it cannot be rescinded in part and affirmed in part.¹⁷¹ As a rule, therefore, it is a condition precedent to the right to rescind a contract on the ground of fraud that the party seeking to rescind shall return, or offer to return, what he has received under the contract;¹⁷² and generally, if the subject-matter has been so dealt with, even before discovery of the fraud, that the parties cannot be reinstated in their former position, the court will not allow a rescission, but will leave the matter to be adjusted by an action for damages by the party injured, or defense or counterclaim in an action by the other party.¹⁷³

The defrauded party need not return what he has received, however, if it has been destroyed, or taken from his control, without fault on his

¹⁶⁸ *Bach v. Tuch*, supra; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; *Goodall v. Stewart*, 65 Miss. 157, 3 South. 257; *Mansfield v. Wilson* (Ark.) 13 S. W. 598; *Bedier v. Reaume*, 95 Mich. 518, 55 N. W. 366; *Wheeler v. Dunn*, 13 Colo. 428, 22 Pac. 827; *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006.

¹⁶⁹ *Lee v. Burnham*, 82 Wis. 209, 52 N. W. 255; *Equitable Co-op. Foundry Co. v. Hersee*, 103 N. Y. 25, 9 N. E. 487; *Hoyt Mfg. Co. v. Turner*, 84 Ala. 523, 4 South. 658; *Baker v. Maxwell*, 99 Ala. 558, 14 South. 468.

¹⁷⁰ Ante, p. 235; *Gilchrist v. Manning*, 54 Mich. 210, 19 N. W. 959; *Mattock v. Reppy*, 47 Ark. 148, 14 S. W. 546; *Hinchman v. Weeks*, 85 Mich. 535, 48 N. W. 790; *Childs v. Merrill*, 63 Vt. 463, 22 Atl. 626, 14 L. R. A. 264; *Union Cent. Life Ins. Co. v. Schidler*, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; *Wabash Valley Protective Union v. James*, 8 Ind. App. 449, 35 N. E. 919; *Teachout v. Van Hoesen*, 76 Iowa, 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. Rep. 206.

¹⁷¹ *Brill v. Rack* (Ky.) 23 S. W. 511; *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. 716; *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785; ante, p. 171. And see the cases cited in the following notes.

¹⁷² *Brown v. Norman*, 65 Miss. 369, 4 South. 293, 7 Am. St. Rep. 663; *Estabrook v. Swett*, 116 Mass. 303; *Cobb v. Hatfield*, 46 N. Y. 533; *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; *Babcock v. Case*, 61 Pa. 427; *Young v. Arntze*, 86 Ala. 116, 5 South. 253; *Doughten v. Association*, 41 N. J. Eq. 556, 7 Atl. 479; *Cookingham v. Dusa*, 41 Kan. 229, 21 Pac. 95; *Carlton v. Hulett*, 49 Minn. 308, 51 N. W. 1053; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Freeman v. Kieffer*, 101 Cal. 254, 35 Pac. 767; *Moore v. Association*, 165 Mass. 517, 43 N. E. 298; *Friend Bros. Clothing Co. v. Hulbert*, 98 Wis. 183, 73 N. W. 784; *Breyfogle v. Walsh*, 80 Fed. 172, 25 C. C. A. 357.

¹⁷³ *Curtiss v. Howell*, 39 N. Y. 211; *Neal v. Reynolds*, 38 Kan. 432, 16 Pac. 785; *Rigdon v. Walcott*, 141 Ill. 649, 31 N. E. 158; *Stanton v. Hughes*, 97 N. C. 318, 1 S. E. 852; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634.

part,¹⁷⁴ or if it is absolutely worthless.¹⁷⁵ Nor need he place the other party in the position which he before occupied, if, by reason of the latter's act, it is impossible to do so. All that can be required is that he return what he has himself received.¹⁷⁶ Mere depreciation in value of the thing received before discovery of the fraud will not defeat rescission;¹⁷⁷ and if in the meantime he has incurred expenses for repairs, he may, on rescission and return, recover the cost.¹⁷⁸

Same—As against Third Persons.

It follows from the principle that the contract is voidable, and not void, that, when innocent third persons have for value acquired rights under the contract, their rights are indefeasible. The rule is also said to be an application of the principle of convenience, that, when one of two innocent persons must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud.¹⁷⁹ Hence, a sale of land or goods cannot be rescinded so as to revest the property in the vendor if the vendee has in the meantime sold them to a bona fide purchaser. The seller's remedy is by an action for damages.¹⁸⁰ The purchase must be for value, and hence the

¹⁷⁴ *Neblett v. Macfarland*, 92 U. S. 101, 23 L. Ed. 471; *Flynn v. Allen*, 57 Pa. 482; *Hammond v. Pennock*, 61 N. Y. 145; *Henninger v. Heald*, 51 N. J. Eq. 74, 26 Atl. 449; *Groff v. Hansel*, 33 Md. 161.

¹⁷⁵ *Fitz v. Bynum*, 55 Cal. 459; *Wicks v. Smith*, 21 Kan. 412, 30 Am. Rep. 433; *Babcock v. Case*, 61 Pa. 427, 100 Am. Dec. 654. If the things received are capable of serving any purpose of advantage by their possession or control, or if their loss would be a disadvantage in any way, they must be returned. "This rule is held with great strictness in actions at law, as in the case of the casks that contained worthless lime (*Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103), and the sack that covered the rejected bale of cotton (*Morse v. Brackett*, 98 Mass. 205; *Id.*, 104 Mass. 494)." *Bassett v. Brown*, 105 Mass. 558. And see *Evans v. Gale*, 17 N. H. 573, 43 Am. Dec. 614.

¹⁷⁶ *Masson v. Bovet*, 1 Denio (N. Y.) 69, 43 Am. Dec. 651; *Hammond v. Pennock*, 61 N. Y. 145; *Guckenheimer v. Angevine*, 81 N. Y. 394; *Gates v. Raymond*, 106 Wis. 657, 82 N. W. 530. And see *John V. Farwell Co. v. Hilton* (C. C.) 84 Fed. 293.

¹⁷⁷ *Veazie v. Williams*, 8 How. 134, 158, 12 L. Ed. 1018; *Neblett v. McFarland*, 92 U. S. 101, 104, 23 L. Ed. 471; *Baker v. Lever*, 67 N. Y. 304, 23 Am. Rep. 117; *Gatling v. Newell*, 9 Ind. 574; *Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. 329, 38 Am. St. Rep. 91.

¹⁷⁸ *Farris v. Ware*, 60 Me. 482.

¹⁷⁹ *Pollock*, Cont. (3d Ed.) 556; *Tiffany*, Sales, 122.

¹⁸⁰ *Babcock v. Lawson*, 4 Q. B. Div. 394; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; *Hoffman v. Noble*, 6 Mete. (Mass.) 68, 39 Am. Dec. 711; *Neff v. Landis*, 110 Pa. 204, 1 Atl. 177; *Le Grand v. Bank*, 81 Ala. 123, 1 South. 460, 60 Am. Rep. 140; *Moore v. Moore*, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170; *Jones v. Christian*, 86 Va. 1017, 11 S. E. 984; *Armstrong v. Lewis*, 38 Ill. App. 164; *First Nat. Bank v. Carriage Co.*, 70 Miss. 550, 12 South. 598; *Scheuer v. Goetter*, 102 Ala. 313, 14 South. 774; *Hall v. Hinks*, 21 Md. 406; *Singer Mfg. Co. v. Sammons*, 49 Wis. 316, 5 N. W. 788; *Cochran v. Stewart*, 21 Minn. 435.

protection does not extend to attaching creditors,¹⁸¹ to an assignee in bankruptcy,¹⁸² or to a person taking the property in payment of an existing indebtedness.¹⁸³

A sale, however, is to be distinguished from mere delivery of possession induced by fraud; for in the latter case the person obtaining possession acquires no property in the goods, and can pass none to a third person, however innocent. Thus, where a person obtains goods by fraudulently impersonating a third person,¹⁸⁴ or by pretending to be the agent of a third person,¹⁸⁵ to whom the owner supposes he is selling, the person thus obtaining the goods acquires no title, and a bona fide purchaser from him stands in no better position. In such case there is no contract at all, as the seller never consented to sell to the person to whom he delivered the goods.

As a rule, if a negotiable instrument is procured by fraud, the party intending to sign it as such, so that there is no mistake as to the character of the instrument, it cannot be avoided on the ground of the fraud after it has passed into the hands of a bona fide purchaser for value;¹⁸⁶ but, as we have seen, it is otherwise where, by fraud or circumvention, a person is induced to sign a negotiable instrument, when he does not intend to sign it, but thinks he is signing something else, provided, of course, he is not guilty of such negligence as will estop him from setting up his mistake.¹⁸⁷

¹⁸¹ *Buffington v. Gerrish*, 15 Mass. 158, 8 Am. Dec. 97; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Jordan v. Parker*, 56 Me. 557; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, 10 N. W. 900, 42 Am. Rep. 53; *Henderson v. Gibbs*, 39 Kan. 679, 684, 18 Pac. 926.

¹⁸² *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993; *Bussing v. Rice*, 2 Cush. (Mass.) 48; *Singer v. Schilling*, 74 Wis. 369, 43 N. W. 101; *Benesch v. Weil*, 69 Md. 274, 14 Atl. 666.

¹⁸³ *Barnard v. Campbell*, 58 N. Y. 73, 17 Am. Rep. 208; *Stevens v. Brennan*, 79 N. Y. 258; *Sleeper v. Davis*, 64 N. H. 59, 6 Atl. 201, 10 Am. St. Rep. 377; *Poor v. Woodburn*, 25 Vt. 235; *McGraw v. Solomon*, 83 Mich. 442, 47 N. W. 345. *Contra*, *Shufeldt v. Pease*, 16 Wis. 659; *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401.

¹⁸⁴ *CUNDY v. LINDSAY*, 3 App. Cas. 459; *Loeffel v. Pohlman*, 47 Mo. App. 574. Cf. *EDMUNDS v. TRANSPORTATION CO.*, 135 Mass. 283.

¹⁸⁵ Cases cited, ante, p. 200, note 16.

¹⁸⁶ *Clark v. Thayer*, 105 Mass. 216, 7 Am. Rep. 531; *Smith v. Livingston*, 111 Mass. 342; *SOUTHWICK v. BANK*, 84 N. Y. 420; *Gridley v. Bane*, 57 Ill. 529; *Ormsbee v. Howe*, 54 Vt. 182, 41 Am. Rep. 841.

¹⁸⁷ See ante, p. 198.

DURESS.

- 142. Duress is actual or threatened violence or imprisonment, by reason of which a person is reasonably forced to enter into a contract. To affect the contract, however,**
- (a) **It must have been against or of the contracting party, or his or her wife, or husband, parent, child, or other near relative.**
 - (b) **It must have been inflicted or threatened by the other party to the contract, or by one acting with his knowledge or on his behalf.**
 - (c) **It must have induced the party to enter into the contract.**
- 143. OF GOODS.** By the weight of modern authority, the unlawful detention of another's goods under oppressive circumstances, or their threatened destruction, may constitute duress.
- 144. EFFECT.** A contract entered into by a person under duress is voidable at his option.

The ground upon which a contract entered into under duress can be avoided is because there is no real consent. The apparent consent is unreal because of the imprisonment or force, or of the fear caused by the threats. "Actual violence," it has been said, "is not necessary to constitute duress, * * * because consent is the very essence of a contract; and, if there be compulsion, there is no actual consent; and moral compulsion, such as that produced by threats to take life, or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. 'Duress,' in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness."¹⁸⁸

¹⁸⁸ *Pierce v. Brown*, 7 Wall. 205, 19 L. Ed. 134. See, also, *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262; *Foshay v. Ferguson*, 5 Hill (N. Y.) 154; *Eadie v. Slimmon*, 26 N. Y. 12, 82 Am. Dec. 395; *French v. Shoemaker*, 14 Wall. 314, 20 L. Ed. 852; *U. S. v. Huckabee*, 16 Wall. 432, 21 L. Ed. 457; *Miller v. Miller*, 68 Pa. 486; *Guillaume v. Rowe*, 94 N. Y. 268, 46 Am. Rep. 141; *Harmon v. Harmon*, 61 Me. 227; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Gottwalt v. Neal*, 25 Md. 434; *Bane v. Detrick*, 52 Ill. 19; *Alexander v. Pierce*, 10 N. H. 494; *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502; *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 321; *Batavian Bank v. North*, 114 Wis. 637, 90 N. W. 1016. A threat by a husband to separate from his wife and not support her has been held such duress as to avoid a deed by her to him induced thereby. *Tapley v. Tapley*, 10 Minn. 448 (Gil. 360), 83 Am. Dec. 76. An angry command by husband to wife, unaccompanied by threats of personal violence, held not duress. *Gabbey v. Forgens*, 38 Kan. 62, 15 Pac. 866. Merely to speak roughly to a woman, without threats of personal violence, is not duress. *Dausch v. Crane*, 109 Mo. 323, 19 S. W. 61. Mere vexation and annoyance is not duress. *Brower v. Callender*, 105 Ill. 88.

The statement of what constitutes duress, made in this and many other cases,¹⁸⁹ requires that the violence or threats shall have been sufficient to overcome a mind of "ordinary firmness," or the mind of a person of "ordinary courage." Some cases, however, have rejected this test, holding that violence or threats employed for the purpose of overcoming the mind, and having that effect, constitute duress, although the mind acted upon be one of less than ordinary firmness.¹⁹⁰

It is almost needless to add that the contract must have been made because of the imprisonment, or of fear of the threatened injury or imprisonment; otherwise, there is no duress.¹⁹¹

Duress per Minas.

Duress per minas, as defined at common law, is where a person is forced to enter into a contract (a) from fear of loss of life; (b) from fear of loss of limb; (c) from fear of mayhem; (d) from fear of imprisonment,—and there is no doubt but that threats of such injuries will constitute duress.¹⁹² Many of the modern English decisions restrict the operation of the rule within the limits mentioned. They deny that contracts procured by menace of a mere battery to the person can be avoided on that ground; and the reason assigned for this rule is that such threats are not of a nature to overcome the mind and will

¹⁸⁹ *United States v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457; *Hines v. Board*, 93 Ind. 266; *MORSE v. WOODWORTH*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; *Flanigan v. City of Minneapolis*, 36 Minn. 406, 31 N. W. 359; *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. 320; *Kennedy v. Roberts*, 105 Iowa, 521, 75 N. W. 363.

¹⁹⁰ *Cribbs v. Sowle*, 87 Mich. 340, 49 N. W. 587, 24 Am. St. Rep. 166; *Baldwin v. Hutchinson*, 8 Ind. App. 454, 35 N. E. 711; *GALUSHA v. SHERMAN*, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. See, also, *Parmentier v. Taber*, 13 Or. 121, 9 Pac. 59. See *Bishop, Cont. § 719*.

¹⁹¹ *Feller v. Green*, 26 Mich. 70; *Flanigan v. City of Minneapolis*, 36 Minn. 406, 31 N. W. 359; *Schwartz v. Schwartz*, 29 Ill. App. 516; *Inhabitants of Whitefield v. Longfellow*, 13 Me. 146; *Alexander v. Pierce*, 10 N. H. 494; *Bosley v. Shanner*, 26 Ark. 280; *Stone v. Weiller*, 57 Hun, 588, 10 N. Y. Supp. 828; *Post v. Bank*, 138 Ill. 559, 28 N. E. 978.

¹⁹² 3 Bac. Abr. "Duress," 252; *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262; and cases hereafter cited. Threat of personal violence. *Pierce v. Brown*, 7 Wall. 205, 19 L. Ed. 134; *Baker v. Morton*, supra; *Magoon v. Reber*, 76 Wis. 392, 45 N. W. 112; *Anderson v. Anderson*, 74 Hun, 56, 26 N. Y. Supp. 492. Threat of criminal prosecution and imprisonment. *Foshay v. Ferguson*, 5 Hill (N. Y.) 154; 2 Co. Inst. 483; Co. Litt. 253b; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Inhabitants of Whitefield v. Longfellow*, 13 Me. 146; *Bane v. Detrick*, 52 Ill. 19; *James v. Roberts*, 18 Ohio, 548; *Baldwin v. Hutchinson*, 8 Ind. App. 454, 35 N. E. 711; *Maricle v. Brooks*, 51 Hun, 638, 5 N. Y. Supp. 210; *Morrison v. Faulkner*, 80 Tex. 128, 15 S. W. 797; *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297; *Winfield Nat. Bank v. Croco*, 46 Kan. 620, 26 Pac. 939. See post, p. 292, and cases cited. A threat to "make complaint" and send the person threatened to prison is not duress, where the threats do not specify an offense for which imprisonment may be had. *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679.

of a firm and prudent man.¹⁹³ There are cases to the same effect in this country, and some of the text writers have adopted the old rule.¹⁹⁴

Many American cases, on the other hand, adopt a more liberal rule, and hold that contracts procured by threats and fear of battery to the person may be avoided on the ground of duress.¹⁹⁵

Duress of Imprisonment.

Imprisonment is any restraint of a person's liberty, whether it be in prison or elsewhere. Any unlawful imprisonment, whatever may be the ground of illegality, constitutes duress, and avoids a contract entered into by the person imprisoned for the purpose of regaining his liberty.¹⁹⁶ Under the older rule, the imprisonment must have been illegal; lawful imprisonment, whatever might be the circumstances, was not regarded as duress;¹⁹⁷ and this rule has been adhered to in some of the modern cases.¹⁹⁸ By the overwhelming weight of modern authority, however, the rule has been so far modified that now even a legal imprisonment will constitute duress if the process is sued out maliciously and without probable cause, or if it is sued out with probable cause, but for an unlawful purpose; as, for instance, where a legal arrest for crime is procured for the purpose of coercing payment of a private demand, or if the imprisonment, though legal, is made unjustly oppressive.¹⁹⁹ All the courts agree, however, that if the imprisonment is lawful, and there is no abuse of process, there is no duress.²⁰⁰

¹⁹³ 2 Co. Inst. 483; Shep. Touch. 6; post, p. 243.

¹⁹⁴ 1 Pars. Cont. 393.

¹⁹⁵ Pierce v. Brown, 7 Wall. 205, 19 L. Ed. 134; Foshay v. Ferguson, 5 Hill (N. Y.) 154; Love v. State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234.

¹⁹⁶ Osborn v. Robbins, 36 N. Y. 365; Guillaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Stepney v. Lloyd, Cro. Eliz. 647, Ewell, Lead. Cas. 760; Fisher v. Shattuck, 17 Pick. (Mass.) 252; Alexander v. Pierce, 10 N. H. 494; Whitefield v. Longfellow, 13 Me. 146; Thompson v. Lockwood, 15 Johns. (N. Y.) 256; Bowker v. Lowell, 49 Me. 429; Tilley v. Damon, 11 Cush. (Mass.) 247.

¹⁹⁷ 2 Co. Inst. 483; Shep. Touch. 6.

¹⁹⁸ Clark v. Turnbull, 47 N. J. Law, 265, 54 Am. Rep. 157; Kelsey v. Hobby, 16 Pet. 269, 10 L. Ed. 961; Taylor v. Cottrell, 16 Ill. 93; Heaps v. Dunham, 95 Ill. 583; McCormick Harvester Co. v. Miller, 54 Neb. 644, 74 N. W. 1061.

¹⁹⁹ Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Richardson v. Duncan, 3 N. H. 508; Selber v. Price, 26 Mich. 518; Eadie v. Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Schoener v. Lissauer, 107 N. Y. 111, 13 N. E. 741; Bane v. Detrick, 52 Ill. 19; Work's Appeal, 59 Pa. 441; Phelps v. Zuschlag, 34 Tex. 371; Holmes v. Hill, 19 Mo. 159; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Town of Sharon v. Gager, 46 Conn. 189; Bentley v. Robson, 117 Mich. 691, 76 N. W. 146; Behl v. Schuett, 104 Wis. 76, 80 N. W. 73.

²⁰⁰ Soule v. Bouney, 37 Me. 128; Prichard v. Sharp, 51 Mich. 432, 16 N. W. 798; Felton v. Gregory, 130 Mass. 176; Taylor v. Cottrell, 16 Ill. 93; Nealey v. Greenough, 25 N. H. 325; Smith v. Atwood, 14 Ga. 402; Stouffer v. Latschaw, 2 Watts (Pa.) 165, 27 Am. Dec. 297; State v. Such, 53 N. J. Law, 351, 21 Atl. 852; Meek v. Atkinson, 1 Bailey (S. C.) 84, 19 Am. Dec. 653; Stebbins

The rule that the imprisonment must be unlawful applies equally to duress per minas, where the threat is of imprisonment. A threat of unlawful arrest and imprisonment is duress,²⁰¹ but, as a rule, a threat of lawful imprisonment is not. A threat, for instance, by a creditor, to bring a suit against his debtor, and procure his arrest therein, is not duress where the creditor may lawfully so proceed.²⁰² It has also been said, without qualification, that, if a person has been wronged by the embezzlement or other criminal act of another, it is not duress to threaten him with a criminal prosecution, and thereby coerce him into giving a note, or otherwise settling for the injury.²⁰³ As we have seen, however, a strictly legal imprisonment procured for the purpose of enforcing a private demand is an abuse of process, and constitutes duress; and on the same principle it has been held duress to threaten imprisonment for such a purpose.²⁰⁴

Duress of Goods.

Under the stricter rule which formerly prevailed, a promise was not given under duress if made in consideration of the release of goods from unlawful destruction or detention, and there is modern authority to the same effect.²⁰⁵ Most courts, however, have established a more liberal rule, and regard duress of goods under oppressive circumstances as sufficient to avoid a contract.²⁰⁶ Duress in this connection must not

v. Niles, 25 Miss. 267, 349; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170; Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191. And see Medrano v. State, 32 Tex. Cr. R. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

²⁰¹ Ante, p. 241, note 192.

²⁰² DUNHAM v. GRISWOLD, 100 N. Y. 224, 3 N. E. 76; Clark v. Turnbull, 47 N. J. Law, 265, 54 Am. Rep. 157; Hilborn v. Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816.

²⁰³ Eddy v. Herrin, 17 Me. 338, 35 Am. Dec. 261; Hilborn v. Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816; Taylor v. Cottrell, 16 Ill. 93; Sanford v. Sornborger, 26 Neb. 295, 41 N. W. 1102; Thorn v. Pinkham, 84 Me. 103, 24 Atl. 718, 30 Am. St. Rep. 335; Weber v. Barrett, 125 N. Y. 18, 25 N. E. 1068; Compton v. Bank, 96 Ill. 301.

²⁰⁴ See MORSE v. WOODWORTH, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Adams v. Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447; Miller v. Bryden, 34 Mo. App. 602; Morrison v. Faulkner, 80 Tex. 128, 15 S. W. 797; Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946; Morrill v. Nightingale, 93 Cal. 452, 28 Pac. 1068, 27 Am. St. Rep. 207; Bryant v. Peck, 154 Mass. 460, 28 N. E. 678; Lighthall v. Moore, 2 Colo. App. 554, 31 Pac. 511; Heaton v. Norton Co. State Bank, 59 Kan. 281, 52 Pac. 876.

²⁰⁵ Atlee v. Backhouse, 3 Mees. & W. 633; SKEATE v. BEALE, 11 Adol. & E. 983; Hazelrigg v. Donaldson, 2 Mete. (Ky.) 445.

²⁰⁶ Lonergan v. Buford, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569; U. S. v. Huckabee, 16 Wall. 432, 21 L. Ed. 457; Foshay v. Ferguson, 5 Hill (N. Y.) 154; Sasportas v. Jennings, 1 Bay (S. C.) 470; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; White v. Heylman, 34 Pa. 142; Motz v. Mitchell, 91 Pa. 114; Miller v. Miller, 68 Pa. 486; Pemberton v. Williams, 87 Ill. 15;

be confounded with want of consideration. If the detention were obviously without right, the promise would be void because of want of consideration; if the right were doubtful, the promise might be supported by a compromise.

Against Whom.

As a rule a contract entered into in order to relieve a third person is not voidable on the ground of duress.²⁰⁷ It should be noted, how-

SCHOLEY v. MUMFORD, 60 N. Y. 498; McPherson v. Cox, 86 N. Y. 472; Crawford v. Cato, 22 Ga. 594; Bennett v. Ford, 47 Ind. 264; Oliphant v. Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363; McCormick v. Dalton, 53 Kan. 146, 35 Pac. 1113; Fuller v. Roberts, 35 Fla. 110, 17 South. 359. A note given, or money paid, to obtain release of goods from attachment fraudulently obtained, may, under some circumstances, be avoided or recovered back. CHANDLER v. SANGER, 114 Mass. 364, 19 Am. Rep. 367; Collins v. Westbury, 2 Bay (S. C.) 211, 1 Am. Dec. 643; Spaid v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Nelson v. Suddarth, 1 Hen. & M. (Va.) 350. But seizure of property claimed by A. under attachment against B. is not duress of A. KINGSBURY v. SARGENT, 83 Me. 230, 22 Atl. 105. So, where a note is given, or money paid, to prevent seizure of property under execution fraudulently obtained, Thurman v. Burt, 53 Ill. 129; or under warrant for the collection of illegal tax or assessment, BOSTON & S. GLASS CO. v. CITY OF BOSTON, 4 Metc. (Mass.) 181; BRUECHER v. VILLAGE OF PORT CHESTER, 101 N. Y. 240, 4 N. E. 272; Bradford v. City of Chicago, 25 Ill. 411. Exactions by carrier before delivery of property. Beckwith v. Frisbie, 32 Vt. 559; Tutt v. Ide, 3 Blatchf. 249, Fed. Cas. No. 14,275b; Harmony v. Bingham, supra. Refusal by carrier to transport freight. Little Rock & Ft. S. Ry. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230. Refusal by carrier to carry stock which has been loaded on cars, unless shipper will sign special contract. Atchison R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148. Refusal by banker to honor check unless fraudulent claim is acceded to, held duress. Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202. Threat to file mechanic's lien. Gates v. Dundon (City Ct. N. Y.) 18 N. Y. Supp. 149. Exactions by customs officer as condition to delivery of property. Maxwell v. Griswold, 10 How. 242, 13 L. Ed. 405; ELLIOTT v. SWARTWOUT, 10 Pet. 137, 9 L. Ed. 373. Mere refusal of debtor to pay debt does not amount to duress of goods, even though creditor be in straitened circumstances, and need the money. Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Secor v. Clark, 117 N. Y. 350, 22 N. E. 754; Cable v. Foley, 45 Minn. 421, 47 N. W. 1135; Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Doyle v. Church, 133 N. Y. 372, 31 N. E. 221. Threat of civil action not duress. McClair v. Wilson, 18 Colo. 82, 31 Pac. 502; Whittaker v. Improvement Co., 34 W. Va. 217, 12 S. E. 507; Wilson S. M. Co. v. Curry, 126 Ind. 161, 25 N. E. 896; Atkinson v. Allen, 71 Fed. 58, 17 C. C. A. 570; York v. Hinkle, 80 Wis. 624, 50 N. W. 895, 27 Am. St. Rep. 73; Bestor v. Hickie, 71 Conn. 181, 41 Atl. 555; Hart v. Strong, 183 Ill. 349, 55 N. E. 629. Threat to levy attachment or execution is not duress. Wilcox v. Howland, 23 Pick. (Mass.) 167; Waller v. Cralle, 8 B. Mon. (Ky.) 11; Stover v. Mitchell, 45 Ill. 213. Threats to prevent clearance of vessel, with power to carry out, is duress of ship's master. Baldwin v. Timber Co., 65 Hun, 625, 20 N. Y. Supp. 496. And see McPherson v. Cox, supra.

²⁰⁷ Robinson v. Gould, 11 Cush. (Mass.) 55; Plummer v. People, 16 Ill. 358; Phillips v. Henry, 160 Pa. 24, 28 Atl. 477, 40 Am. St. Rep. 706; Jones v. Turn-

ever, that a simple contract, the consideration for which is the discharge of a third person from illegal imprisonment, would be void for want of consideration.²⁰⁸ Though the law does not regard a person as under duress who enters into a contract to relieve a stranger, it is otherwise where the person relieved is a near relative, as a husband, wife, parent, or child.²⁰⁹ These are the only relationships generally mentioned in the books, but the rule has been extended to other relationships, as of brother, sister, grandparent, or grandchild.²¹⁰

By Whom.

The duress, to be available as a defense, must have been inflicted or threatened by the other party to the contract, or by some one acting with his connivance.²¹¹ A person entering into a contract with another under duress exercised by a third person may avoid the contract if the third person was the other party's agent, or if the other party knew the circumstances,²¹² but not if he acted in good faith and without such knowledge.

er, 5 Litt. (Ky.) 147; *Wright v. Remington*, 41 N. J. Law, 48, 32 Am. Rep. 180; *Spaulding v. Crawford*, 27 Tex. 155; *Lewis v. Bannister*, 16 Gray (Mass.) 500 (creditors). A surety cannot avoid a common-law bond or note on the ground that his principal was under duress. *Huscombe v. Standing*, Cro. Jac. 187; *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931. Contra, *Strong v. Granis*, 26 Barb. (N. Y.) 122. But it is otherwise in the case of statutory bonds, such as a bond given under a statute to release the principal from imprisonment, where the imprisonment is illegal. In such case the officer has no right to take the bond, and it is void. *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256. And see *State v. Brantley*, 27 Ala. 44; *Patterson v. Gibson*, 81 Ga. 802, 10 S. E. 9, 12 Am. St. Rep. 356; *Fisher v. Shattuck*, 17 Pick. (Mass.) 252; *Jones v. Turner*, 5 Litt. (Ky.) 147. But see *Plummer v. People*, 16 Ill. 358; *Huggins v. People*, 39 Ill. 246; *Inhabitants of Bordentown Tp. v. Wallace*, 50 N. J. Law, 13, 11 Atl. 267.

²⁰⁸ Ante, p. 123.

²⁰⁹ *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *Plummer v. People*, 16 Ill. 360; *First Nat. Bank v. Bryan*, 62 Iowa, 42, 17 N. W. 165; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8; *Brooks v. Berryhill*, 20 Ind. 97; *Southern Exp. Co. v. Duffey*, 48 Ga. 361; *Adams v. Bank*, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447; *McClatchie v. Haslam*, 63 Law T. 376; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Bryant v. Peck*, 154 Mass. 460, 28 N. E. 678; *CITY NAT. BANK v. KUSWORM*, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880; *Giddings v. Iowa Sav. Bank*, 104 Iowa, 676, 74 N. W. 21; *Heaton v. Norman Co.'s Bank*, 59 Kan. 281, 52 Pac. 876; *Davis v. Smith*, 68 N. H. 253, 44 Atl. 384, 73 Am. St. Rep. 584.

²¹⁰ *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946; *Bradley v. Irish*, 42 Ill. App. 85. It seems that it does not extend to master and servant. 1 Rolle, Abr. 687; Bac. Abr. "Duress," B; 2 Brownl. 276.

²¹¹ 1 Rolle, Abr. 688; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; *Fightmaster v. Levi* (Ky.) 17 S. W. 195; *Sherman v. Sherman* (Com. Pl. N. Y.) 20 N. Y. Supp. 414; *Compton v. Bank*, 96 Ill. 301, 36 Am. Rep. 147; *Schwartz v. Schwartz*, 29 Ill. App. 516.

²¹² *Fairbanks v. Snow*, supra; *McClatchie v. Haslam*, 63 Law T. 376.

Effect.

A contract is not void because it was entered into under duress, but, as in the case of fraud, is merely voidable at the option of the injured party, and stands unless he sees fit to avoid or rescind it. He may either ratify or disaffirm it, and may do so by his conduct.²¹³ The rules as to the right to rescind a contract for fraud apply with equal force here, and it is unnecessary to repeat them.

UNDUE INFLUENCE.

145. Undue influence is a species of fraud. It may be said generally to consist—

- (a) **In the use by one in whom confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.**
- (b) **In taking an unfair advantage of another's weakness of mind.**
- (c) **In taking a grossly oppressive and unfair advantage of another's necessities and distress.**

146. EFFECT. Undue influence renders a contract voidable at the option of the injured party.

Courts of equity have always given a wider interpretation to the term "fraud" than that adopted by the courts of common law. Looking beyond definite false and fraudulent statements, they have inferred from a long course of conduct, from the peculiar relations of the parties, or from the circumstances of one of them, that an unfair advantage has been taken of the promisor, and that his promise ought not, in equity, to bind him. The taking of such an unfair advantage is sometimes called "fraud," but it is more convenient, for the purpose of distinguishing it from the kind of fraud with which we have already dealt, to call it the "exercise of undue influence."²¹⁴ It is difficult to give a clear and concise definition of "undue influence" because of the wide meaning of the term. The definition given in the black-letter

²¹³ *Miller v. Minor*, 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; *OREGON PAC. R. CO. v. FORREST*, 128 N. Y. 83, 28 N. E. 137; *Veach v. Thompson*, 15 Iowa, 380; *Belote v. Henderson*, 5 Cold. (Tenn.) 472, 98 Am. Dec. 432; *Brown v. Peck*, 2 Wis. 261; *Deputy v. Stapleford*, 19 Cal. 302; *Eberstein v. Willets*, 134 Ill. 101, 24 N. E. 967; *Bush v. Brown*, 49 Ind. 577, 19 Am. Rep. 695; *Sornborger v. Sanford*, 34 Neb. 498, 52 N. W. 368; *Commercial Nat. Bank v. Wheelock*, 52 Ohio St. 534, 40 N. E. 636, 49 Am. St. Rep. 738. Post, p. 234. A negotiable instrument executed under duress is binding in hands of bona fide purchaser for value. *Hogan v. Moore*, 48 Ga. 156; *Clark v. Pease*, 41 N. H. 414; *THOMPSON v. NIGGLEY*, 53 Kan. 664, 35 Pac. 290, 26 L. R. A. 803.

²¹⁴ *Anson, Cont.* (4th Ed.) 165.

text, and taken substantially from the proposed New York Code, is probably as good as can be framed without going beyond a mere definition.²¹⁵ Another good definition is given by an English judge, who, in speaking of the sort of cases "which * * * raise, from the circumstances and conditions of the parties contracting, a presumption of fraud," says: "Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and, when the relative position of the parties is such as prima facie to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable."²¹⁶

Neither in law nor in morals is a person standing in confidential relations to another prohibited from exerting any influence whatever to obtain a benefit to himself. The influence must be what the law regards as "undue influence."²¹⁷ "Influence obtained by modest persuasion, and arguments addressed to the understanding, or by mere appeals to the affections, cannot properly be termed 'undue influence' in a legal sense;²¹⁸ but influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will" of a person "to such an extent as to destroy the free agency,²¹⁹ or constrain him to do against his will what he is unable to refuse, is such an influence as the law condemns as undue."²²⁰

The Presumption from Circumstances.

When it is said that equity presumes prima facie the exercise of undue influence from the circumstances, we mean that, when certain circumstances are shown to have existed, the court will, from that alone, hold that the contract was procured by undue influence, and will relieve the promisor unless the promisee assumes the burden of proof, and shows that everything was fair and just.²²¹ In some cases the relation

²¹⁵ Proposed N. Y. Civ. Code, 231.

²¹⁶ Lord Selbourne, in *Earl of Aylesford v. Morris*, 8 Ch. 490. See, also, *Green v. Roworth*, 113 N. Y. 462, 21 N. E. 165; *Nelson's Will*, 39 Minn. 204, 39 N. W. 143.

²¹⁷ *Wallace v. Harris*, 32 Mich. 397.

²¹⁸ *Rogers v. Higgins*, 57 Ill. 244; *Wise v. Foote*, 81 Ky. 10; *Hale v. Cole*, 31 W. Va. 576, 8 S. E. 516; *Beith v. Beith*, 76 Iowa, 601, 41 N. W. 371; *Black v. Foljambre*, 39 N. J. Eq. 234; *Sturtevant v. Sturtevant*, 116 Ill. 340, 6 N. E. 428; *Bowdoin College v. Merrett (C. C.)* 75 Fed. 480; *In re Coleman's Estate*, 193 Pa. 605, 44 Atl. 1085.

²¹⁹ *Latham v. Udell*, 38 Mich. 238; *Layman v. Conrey*, 60 Md. 286.

²²⁰ *Schofield v. Walker (In re Disbrow's Estate)* 58 Mich. 96, 24 N. W. 624.

²²¹ *Dent v. Bennett*, 4 Mylne & C. 269; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428, at page 99; *Fisher v. Bishop*, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357; *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. 275, 55 Am.

alone, being confidential, raises the presumption. In others, the confidential character of the relation must be shown. In others, want or inadequacy of consideration will raise the presumption.²²²

"We may therefore frame the question we have to discuss somewhat in this way: When a man demands equitable remedies, either as plaintiff or defendant, seeking to escape the effects of a grant which he has made gratuitously, or a promise which he has given upon a very inadequate consideration, what must be shown in addition to this in order to raise the presumption that undue influence has been at work?"²²³

Relationship of Parties—Parental and Quasi Parental Relation.

One class of circumstances which will raise the presumption that undue influence was used in procuring another to enter into a contract is where the party benefited stood in some such relation to him as to render him peculiarly subject to influence. Parental or quasi parental relations subsisting between promisor and promisee, or grantor and grantee, will raise this presumption.²²⁴ Where an orphan who had been living with her uncle for seven years became security for him soon after attaining her majority, it was said by the court, adverting to the fact that the security was obtained, through the influence of one standing in loco parentis, from the object of his protection and care: "This is a transaction which, under ordinary circumstances, this court will not allow. * * * This court does not interfere to prevent an act, even of bounty, between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."²²⁵

Same—Other Family Relations.

The term "parental relations" applies, not only to the actual relation of parent and child, and of one in loco parentis and child, but extends to husband and wife, brother and brother or sister, and to all cases

Rep. 479; *Greenfield's Estate*, 14 Pa. 489; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119; *Sands v. Sands*, 112 Ill. 225; *Ward v. Armstrong*, 84 Ill. 151; *Zeigler v. Hughes*, 55 Ill. 288; *Jennings v. McConnel*, 17 Ill. 148; *Casey v. Casey*, 14 Ill. 112.

²²² Ante, p. 60. The acceptance of a voluntary donation throws upon the acceptor the necessity of proving that the transaction was just. *Houghton v. Houghton*, 15 Beav. 299.

²²³ Anson, Cont. (4th Ed.) 166.

²²⁴ *Taylor v. Taylor*, 8 How. 183, 12 L. Ed. 1040; *Miskey's Appeal*, 107 Pa. 611; *Noble's Adm'r v. Moses*, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; *Highberger v. Stiffler*, 21 Md. 338, 83 Am. Dec. 593; *Berkmeyer v. Kellerman*, 32 Ohio St. 239, 30 Am. Rep. 577; *Brown v. Burbank*, 64 Cal. 99, 27 Pac. 940; *Clutter v. Clutter*, 8 Ky. Law Rep. 956, 4 S. W. 182; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480. But see *Jenkins v. Pye*, 12 Pet. 241, 9 L. Ed. 1070.

²²⁵ *Archer v. Hudson*, 7 Beav. 560.

in which one member of a family, from age, character, or circumstances, exercises a substantial preponderance of authority in the family councils.²²⁶

Same—Fiduciary Relations.

Persons standing in a fiduciary relation occupy a relation of confidence, and are within this equitable rule. A contract between a trustee and his cestui que trust,²²⁷ or between a guardian and his ward,²²⁸ is looked upon with suspicion. It is presumed that the trustee or guardian who is benefited by the promise of his cestui que trust or ward has used his peculiar position of confidence to his own advantage, and, in order that the contract may stand, he must show the contrary.

Same—Other Confidential Relations.

The power which a spiritual adviser may acquire over persons subject to his influence is also looked upon as raising the presumption of undue influence;²²⁹ and to this may be added a number of other relations, such as attorney or solicitor and client,²³⁰ and doctor and patient.²³¹ The relations mentioned are not all.²³² The courts have not limited or defined the relations which they will regard as raising this

²²⁶ *Green v. Roworth*, 113 N. Y. 462, 21 N. E. 165; *Harvey v. Mount*, 8 Beav. 439; *Graham v. Burch*, 44 Minn. 33, 46 N. W. 148; *Smyley v. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Watkins v. Brant*, 46 Wis. 419, 1 N. W. 82; *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. 843; *Golding v. Golding*, 82 Ky. 51; *Swisshelm's Appeal*, 56 Pa. 475, 94 Am. Dec. 107; *Hill v. Miller*, 50 Kan. 659, 32 Pac. 354; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 528; *Brown v. Burbank*, 64 Cal. 99, 27 Pac. 940; *Greene v. Greene*, 42 Neb. 634, 60 N. W. 937, 47 Am. St. Rep. 724; *Woods v. Roberts*, 185 Ill. 489, 57 N. E. 426.

²²⁷ *Spencer's Appeal*, 80 Pa. 317; *Ward v. Armstrong*, 84 Ill. 151; *Jones v. Lloyd*, 117 Ill. 597, 7 N. E. 119; *Nichols v. McCarthy*, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105; *McCants v. Bee*, 1 McCord, Eq. (S. C.) 383, 16 Am. Dec. 610. Principal and agent. *Burke v. Taylor*, 94 Ala. 530, 10 South. 129.

²²⁸ *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918; *Wiekiser v. Cook*, 85 Ill. 68; *Wade v. Pulsifer*, 54 Vt. 45; *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. 843; *Garvin's Adm'r v. Williams*, 44 Mo. 465, 100 Am. Dec. 314; *Id.*, 50 Mo. 206.

²²⁹ *Huguennin v. Baseley*, 14 Ves. 273; *Marx v. McGlynn*, 88 N. Y. 357; *Corrigan v. Pironi*, 48 N. J. Eq. 607, 23 Atl. 355; *Ross v. Conway*, 92 Cal. 632, 28 Pac. 785; *Finegan v. Theisen*, 92 Mich. 173, 52 N. W. 619; *Ford v. Hennessy*, 70 Mo. 580. Spirit medium's influence over believer in spiritualism. *Thompson v. Hawks* (C. C.) 14 Fed. 902; *Connor v. Stanley*, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84.

²³⁰ *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735; *Carter v. West*, 93 Ky. 211, 19 S. W. 592; *McGinn v. Tobey*, 62 Mich. 252, 28 N. W. 818, 4 Am. St. Rep. 848; *Jennings v. McConnel*, 17 Ill. 148; *Zeigler v. Hughes*, 55 Ill. 288; *Ryan v. Ashton*, 42 Iowa, 365.

²³¹ *Audenreid's Appeal*, 89 Pa. 114, 33 Am. Rep. 731; *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; *Dent v. Bennett*, 4 Mylne & C. 269; *Blackie v. Clark*, 15 Beav. 603; *Cadwallader v. West*, 48 Mo. 483; *Watson v. Mahan*, 20 Ind. 227.

²³² *Dent v. Bennett*, 4 Mylne & C. 269; *Drake's Appeal*, 45 Conn. 9; *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197; *Pierce v. Pierce*, 71 N. Y.

presumption of influence. The principle, it is said, applies to every case where "influence is acquired and abused, where confidence is reposed and betrayed."²³³ Thus, where a young man who had just attained his majority incurred heavy liabilities to a person by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation, it was held that influence of this nature entitled the young man to the protection of the court. "The principle," it was said, "applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the court of chancery most ordinarily deals are those of trustee and cestui que trust, and such like. It applies especially to those cases, for this reason, and for this reason only: that from those relations the court presumes confidence put and influence exerted, whereas, in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically. But, where they are proved extrinsically, the rules of reason and common sense, and the technical rules of a court of equity, are just as applicable in the one case as the other."²³⁴

Same—Continuance of Presumption.

The presumption of undue influence from the parental or quasi parental relation does not cease as soon as the child becomes of age and is emancipated in law. His judgment must also be emancipated. The confidential relation and consequent presumption of undue influence continues until the child is entirely released from any sort of control;²³⁵ and the same principle applies to the relation of guardian and ward and the other confidential relations.²³⁶

154, 27 Am. Rep. 22; Darlington's Appeal, 86 Pa. 512, 27 Am. Rep. 726; Rockafellow v. Newcomb, 57 Ill. 186; Cadwallader v. West, 48 Mo. 483; Caspari v. Church, 82 Mo. 649; Allcord v. Skinner, 36 Ch. Div. 145; Hessick v. Hessick, 169 Ill. 486, 48 N. E. 712; Russell v. Russell, 60 N. J. Eq. 282, 47 Atl. 37. As to master and servant, Doran v. McConlogue, 150 Pa. 98, 24 Atl. 357.

²³³ Sears v. Shafer, 6 N. Y. 268; Fisher v. Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357; Long v. Mulford, 17 Ohio St. 484, 93 Am. Dec. 638; Leighton v. Orr, 44 Iowa, 679; Haydock v. Haydock's Ex'rs, 34 N. J. Eq. 570. 38 Am. Rep. 385; McCormick v. Malin, 5 Blackf. (Ind.) 509; Todd v. Grove, 33 Md. 188; Cherbonnier v. Evitts, 56 Md. 276; Hansen v. Berthelsen, 19 Neb. 433, 27 N. W. 423; McClure v. Lewis, 72 Mo. 314; Williams v. Collins, 67 Iowa, 413, 25 N. W. 682; Hanna v. Wilcox, 53 Iowa, 547, 5 N. W. 717; Reed v. Peterson, 91 Ill. 288; Norris v. Tayloe, 49 Ill. 17, 95 Am. Dec. 568; Courtney v. Blackwell, 150 Mo. 245, 51 S. W. 668.

²³⁴ Smith v. Kay, 7 H. L. Cas. 750, 779. See, also, Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632.

²³⁵ Archer v. Hudson, 7 Beav. 560; Ashton v. Thompson, 32 Minn. 25, 18 N. W. 918; Noble's Adm'r v. Moses, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175; Miller v. Simonds, 72 Mo. 669; White v. Ross, 160 Ill. 56, 43 N. E. 336.

²³⁶ Rhodes v. Bates, L. R. 1 Ch. 252; Mitchell v. Homfray, 8 Q. B. Div. 587.

Mental Weakness.

Mere weakness of intellect, not so great as to render the person non compos mentis, will not of itself affect the validity of a contract.²³⁷ If, however, the other party has taken advantage of such weakness, and by the use of fraud and undue influence has made an unfair contract, it will be set aside.²³⁸

Personal Influence Absent—Advantage Taken of Another's Necessities and Distress.

The doctrine of undue influence has been extended to a class of cases from which the element of personal influence is altogether absent. They all appear to possess these common features, namely, that the promisor incumbers himself with heavy liabilities for the sake of a small gain, or, at any rate, an inadequate present gain; and the promisee takes advantage either of the improvidence and moral weakness, or else of the ignorance and unprotected situation of the promisor, or, as stated in the black-letter text, takes an unfair advantage of the promisor's weakness of mind,²³⁹ or of his necessities and distress.²⁴⁰ The law has attempted by statute in some jurisdictions, as in case of the usury laws, to guard against advantage being taken against persons in such a situation, and courts of equity at one time adopted a rule that purchasers of any reversionary interest might always be called upon to show that they had given full value for their bargains, so that they might not take advantage of a man's present necessities to deprive him of his future estates without reasonable return.²⁴¹ The usury laws do not exist in all jurisdictions, and the rule as to reversionary interests has been, to a great extent, abrogated by statute in England, and is recognized in very few cases with us. If, however, a man, even in the absence of usury laws, takes advantage of the present poverty of an expectant heir to extort from him an exorbitant and ruinous rate of interest, he is liable to have the bargain set aside, and to be remitted to his claim for the amount of money he has actually advanced, with

²³⁷ Ante, p. 179.

²³⁸ Norton v. Norton, 74 Iowa, 161, 37 N. W. 129; Tracey v. Sacket, 1 Ohio St. 54, 58, 59 Am. Dec. 610; Rider v. Miller, 86 N. Y. 507; Morton's Adm'r v. Morton (N. J. Ch.) 8 Atl. 807; Oakey v. Ritchie, 69 Iowa, 69, 28 N. W. 448; Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260; Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. 383, 28 L. Ed. 934; Fishburne v. Ferguson's Heirs, 84 Va. 87, 4 S. E. 575; Moore v. Moore, 56 Cal. 89; Rippey v. Grant, 39 N. C. 443; Churchill v. Scott, 65 Mich. 485, 32 N. W. 737.

²³⁹ Selden v. Myers, 20 How. 506, 15 L. Ed. 976.

²⁴⁰ Moore v. Moore, 81 Cal. 195, 22 Pac. 589; Wooley v. Drew, 49 Mich. 290, 13 N. W. 594; McCants v. Bee, 1 McCord, Eq. (S. C.) 383, 16 Am. Dec. 610.

²⁴¹ Chesterfield v. Jansen, 2 Ves. 125; 1 White & T. Lead. Cas. Eq. 428; Jenkins v. Pye, 12 Pet. 241, 9 L. Ed. 1070.

the current rate of interest upon it.²⁴² "In ordinary cases," it is said, "each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of 'the expectant heir,' or of persons under pressure without adequate protection, and in the case of dealings with uneducated, ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract."²⁴³ The court will look to the reasonableness of the transaction under all the circumstances of the case; and if it appears that one has taken advantage of the unprotected condition of the other to drive a hard bargain, whether such condition arose from mental or moral weakness or ignorance, or from present necessity and distress, the transaction will not be allowed to stand.²⁴⁴

Another case in which this rule has been applied is in the case of a sale of the equity of redemption by a mortgagor to the mortgagee. The sale may be avoided by the mortgagor if any undue advantage was taken of his necessities.²⁴⁵

Effect.

The rules respecting the right to rescind contracts entered into under undue influence follow, so far as equity is concerned, the rules which apply to fraud,²⁴⁶ but with one noticeable qualification. In the case of fraud, so soon as the fraud is discovered, the parties are placed on equal terms, and an affirmation of the contract binds the party who was originally defrauded; but in the case of undue influence it is not a particular statement, but a combination of circumstances, which constitutes the vitiating element in the contract, and unless it is clear that the will

²⁴² *Aylesford v. Morris*, 8 Ch. 484. *Anson, Cont.* (4th Ed.) 169. And see cases cited in note 244, *infra*. The mere fact, however, that exorbitant interest is charged does not show that the contract is unconscionable. *Whittier v. Collins*, 15 R. I. 44, 23 Atl. 39. Where there is no actual fraud, and no fiduciary relation between the purchaser of a reversionary interest and his vendor, mere inadequacy of consideration is not sufficient to avoid the sale unless it is so great as to shock the moral sense. *Mayo's Ex'r v. Carrington's Ex'r*, 19 Grat. (Va.) 74; *Cribbins v. Markwood*, 13 Grat. (Va.) 495, 67 Am. Dec. 775. And see *Parmelee v. Cameron*, 41 N. Y. 392; *Davidson v. Little*, 22 Pa. 245, 60 Am. Dec. 81.

²⁴³ *O'Rorke v. Bolingbroke*, 3 App. Cas. 823.

²⁴⁴ *Benyon v. Cook*, 10 Ch. 389; *Hough's Adm'rs v. Hunt*, 2 Ohio, 495, 15 Am. Dec. 569; *Boynton v. Hubbard*, 7 Mass. 112; *Parsons v. Ely*, 45 Ill. 232; *Butler v. Duncan*, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711; *Kelley v. Caplice*, 23 Kan. 474, 33 Am. Rep. 179; *Jenkins v. Pye*, 12 Pet. 241, 9 L. Ed. 1070; *Bacon v. Bonham*, 33 N. J. Eq. 614, 617; *Mastin v. Marlow*, 65 N. C. 695.

²⁴⁵ *Pengh v. Davis*, 96 U. S. 337, 24 L. Ed. 775; *Oliver v. Cunningham* (C. C.) 7 Fed. 689; *Dorrill v. Eaton*, 35 Mich. 302; *Jones, Mtg.* (5th Ed.) § 711.

²⁴⁶ *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622; *CITY NAT. BANK OF DAYTON v. KUSWORM*, 91 Wis. 166, 64 N. W. 843; *ante*, p. 234.

of the injured party is relieved from the dominant influence under which it has acted, or that the imperfect knowledge with which he entered into the contract is supplemented by the fullest assistance and information, an affirmation will not be allowed to bind him.²⁴⁷ As in the case of duress, the undue influence must have been exercised by or with the cognizance of the other party.²⁴⁸

²⁴⁷ Anson, Cont. (4th Ed.) 169; *Moxon v. Payne*, 8 Ch. 881.

²⁴⁸ *Dent v. Long*, 90 Ala. 172, 7 South. 640. Contra, where the other party has not paid a valuable consideration, *Graham v. Burch*, 44 Minn. 33, 46 N. W. 148.

CHAPTER VIII.

LEGALITY OF OBJECT.

- 147. In General.
- 148. Classification of Unlawful Agreements.
- 149. Agreements in Violation of Positive Law.
- 150. Breach of Rules of Common Law.
- 151. Breach of Statute—Constitutional Law.
- 152. Prohibition by Statute.
- 153. Particular Agreements in Breach of Statute.
- 154-155. Agreements Contrary to Public Policy.
- 156. Agreements Tending to Injure the Public Service.
- 157. Nonofficial Corruption.
- 158-160. Perversion or Obstruction of Justice.
- 161. Encouragement of Litigation—Champerty and Maintenance.
- 162. Agreements of Immoral Tendency.
- 163. Agreements Tending to Fraud and Breach of Trust.
- 164. Agreements in Derogation of the Marriage Relation.
- 165. Agreements in Derogation of Parental Relation.
- 166-169. Agreements in Restraint of Trade.
- 170-172. Unlawful Combinations—Monopolies, Trusts, etc.
- 173-175. Exempting from Liability for Negligence.
- 176. Effect of Illegality—Agreements Partly Illegal.
- 177-178. Object Unlawful but Intention Innocent.
- 179-181. Object Innocent but Intention Unlawful.
- 182. Promises to Pay Money Due on Illegal Transactions.
- 183-185. Relief of Party to Unlawful Agreement.
- 186. Conflict of Laws—In Space.
- 187. In Time.

IN GENERAL.

- 147. An agreement is not enforceable at law, and therefore does not result in a contract, if its object is illegal.**

We come now to deal with the only remaining element in the formation of a valid contract,—the legality of the matter or object of the agreement. To result in a contract, an agreement must create an obligation; and it does not create an obligation if it is such that the courts cannot enforce it. An agreement, therefore, which is illegal or unlawful, is in fact no contract at all, though it is often spoken of as an illegal contract.

As a rule the law does not interfere with the freedom of persons to enter into contracts, but some limitations are imposed. Certain objects are forbidden, and though all the other elements necessary to the formation of a valid contract may be present, yet if one of these for-

bidden objects is contemplated by the parties, the courts will not enforce their agreement. The object makes the agreement unlawful.

CLASSIFICATION OF UNLAWFUL AGREEMENTS.

148. For convenience in treatment, unlawful agreements may be classified, according to their matter or object, as

- (a) **Agreements in violation of positive law; and**
- (b) **Agreements contrary to public policy.**

The distinction here made between agreements in violation of positive law and agreements contrary to public policy is in the reasons which determine the law to hold the agreement void, and not in the nature or operation of the law itself. The nullity of the agreement itself is in every case a matter of positive law;¹ but in one class of cases the acts contemplated by the agreement are prohibited by the common law or by statute, while in the other the prohibition rests more particularly on public policy, or, as it is sometimes called, the "policy of the law." It is not always easy to distinguish between the two classes, for frequent decisions upon certain matters of public policy have established such definite rules regarding them that they are in effect rules of the common law. Too much importance, therefore, must not be attached to any classification of the subject.

AGREEMENTS IN VIOLATION OF POSITIVE LAW.

149. Any agreement which involves the doing of an act which is positively forbidden by law, or, what amounts to the same thing, the omission to do an act which is positively enjoined by law, is illegal and void. Acts may be so prohibited or enjoined

- (a) **By the rules of the common law; or**
- (b) **By statute.**

There are many acts which the law positively forbids or enjoins, and to the doing or omission of which some penalty is attached. Whether the prohibition or injunction is by the common law or by statute is altogether immaterial. The act or omission prohibited may be some grievous crime, such as murder; or it may be an act or omission prohibited merely as a police regulation, as in the case of statutes regulating the conduct of a particular trade or business, with only a small fine as the penalty; or again it may be only a civil wrong. All of these cases stand on the same footing. If the subject-matter or object of an agreement is such that its performance would consist in an act or

¹ Pol. Cont. (3d Ed.) 251.

omission so forbidden, or be so connected therewith as to be in substance part of the same transaction, the courts will not enforce it.

SAME—BREACH OF RULES OF COMMON LAW.

150. The agreements which are illegal because they are in breach of rules of the common law are:

- (a) **Agreements involving the commission of crime; and**
- (b) **Agreements involving the commission of a civil wrong.**

This classification, like that in the preceding section, is, from the nature of the subject, only approximate, and for convenience in treatment. Many acts are prohibited by statute which were formerly prohibited by the common law, and many acts which are prohibited by the common law in one state are prohibited by statute in another, and in some states there are no common-law crimes at all. For this reason, in treating of agreements in breach of rules of the common law we must include agreements in breach of statutes which are merely declaratory of the common law.

Agreements Involving the Commission of Crime.

The simplest instance of an agreement contrary to positive law is an agreement to commit a crime or indictable offense. Every agreement to commit a crime or indictable offense, either as the final object or as a means to an object which, except for such means, would be lawful, is illegal and void. "If one bind himself in an obligation to kill a man, burn a house, maintain a suit, or the like, it is void."² An agreement, therefore, to write, print, or publish a libelous book or article,³ or an obscene book, article, or picture,⁴ is void. And so it is with an agreement to commit an assault.⁵ Not only are such agreements illegal and void, but the agreement itself is a crime known in the criminal law as a "conspiracy." The crime of conspiracy is also committed in some cases where it is agreed to commit some civil wrong; but the invalidity of such an agreement does not need to rest on its criminal character.

Agreement to Commit Civil Wrong.

An agreement will generally be illegal if it contemplates a civil wrong to a third person, though the wrong may not be an indictable offense, and though the agreement may not amount to the crime of conspiracy. An agreement to divide the profits of a fraudulent scheme,

² Shep. Touch. 370.

³ Post, p. 259.

⁴ Popplett v. Stockdale, 1 Ryan & M. 337; Gale v. Leckie, 2 Starkie, 107.

⁵ Allen v. Rescous, 2 Lev. 174.

or to carry out some object in itself lawful, by means of a trespass, breach of contract, or breach of trust, is unlawful and void. The acts contemplated, though not necessarily criminal, are contrary to positive law.⁶

Same—Frauds on Creditors.

Among the agreements void because they involve a civil wrong are agreements in fraud of creditors. Thus, in case of compositions with creditors, if in order to procure the consent of some particular creditor, or for any other reason, the debtor secretly promises him some advantage over the others, the agreement is void. In a composition with creditors, "each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void; not only can he take no advantage from it, but he is also to lose the benefit of the composition."⁷ A creditor who has not participated in the fraud may repudiate the composition and recover on the original claim.⁸

⁶ SCOTT v. BROWN [1892] 2 Q. B. 724; Begbie v. Sewage Co., L. R. 10 Q. B. 491; Clement's Appeal, 52 Conn. 464; Allen v. Rescous, 2 Lev. 174; Hatch v. Mann, 15 Wend. (N. Y.) 44; Davis v. Arledge, 3 Hill (S. C.) 170, 30 Am. Dec. 360; McCall's Adm'r v. Capehart, 20 Ala. 521; Gleason v. Railroad Co. (Iowa) 43 N. W. 517; WOODSTOCK IRON CO. v. EXTENSION CO., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; Huckins v. Hunt, 138 Mass. 366; Gray v. McReynolds, 65 Iowa, 461, 21 N. W. 777, 54 Am. Rep. 16; Bloss v. Bloomer, 23 Barb. (N. Y.) 604; Thomas v. Caulkett, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369; Smith v. Humphreys, 88 Me. 345, 34 Atl. 166; note 209, *infra*. Where A. pays B. for goods for C., intending that C. shall not have to pay anything, and B. and C. secretly agree for a further payment by C., the agreement is void as a fraud on A. Jackson v. Duchaire, 3 Term R. 551. Perpetration of fraud on the public. MATERNE v. HORWITZ, 101 N. Y. 469, 5 N. E. 331; Jerome v. Bigelow, 66 Ill. 452, 16 Am. Rep. 597. Contract for use of name of musical director for band with which he is not connected. Blakely v. Sousa, 197 Pa. 305, 47 Atl. 286. See, also, Messer v. The Fadettes, 168 Mass. 140, 46 N. E. 407, 37 L. R. A. 721, 60 Am. St. Rep. 371.

⁷ Mullalieu v. Hodgson, 16 Q. B. 689; FROST v. GAGE, 3 Allen (Mass.) 560; Partridge v. Messer, 14 Gray (Mass.) 180; Ramsdell v. Edgerton, 8 Mete. (Mass.) 227, 41 Am. Dec. 503; Clarke v. White, 12 Pet. 178, 9 L. Ed. 1046; KULLMAN v. GREENEBAUM, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150; Cobleigh v. Pierce, 32 Vt. 788; O'Shea v. Oil Co., 42 Mo. 397, 97 Am. Dec. 332; Way v. Langley, 15 Ohio St. 392; Frieberg v. Treitschke, 36 Neb. 880, 55 N. W. 273; Hefter v. Cahn, 73 Ill. 296; Huckins v. Hunt, 138 Mass. 366; Brown v. Neally, 161 Mass. 1, 36 N. E. 464; Powers Dry Goods Co. v. Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460; Merritt v. Bucknam, 90 Me. 146,

⁸ Zell Guano Co. v. Emry, 113 N. C. 85, 18 S. E. 89; KULLMAN v. GREENEBAUM, 92 Cal. 403, 28 Pac. 674, 27 Am. St. Rep. 150; Powers Dry Goods Co. v. Harlin, 68 Minn. 193, 71 N. W. 16, 64 Am. St. Rep. 460.

Same—Fraud in Connection with Sales at Auction.

Where property is put up for sale at public auction, any agreement between the auctioneer or person having control of the sale and third persons by which fictitious bids are to be made, so as to raise the price, is a fraud on the purchaser,⁹ and no rights can be based upon it. A person, for instance, engaged to make fictitious bids, could not recover compensation promised him. We are here speaking of illegal agreements only, and therefore have nothing to do with the rights of the purchaser at an auction sale. His contract is not illegal. He can avoid it,¹⁰ but this is because of the fraud, not because of any illegality. The illegality is in the agreement to commit the fraud. The sale is not illegal, but merely voidable at the purchaser's option.

In like manner agreements between persons for the purpose of deterring bidders and preventing competition at an auction sale are illegal as being a fraud on the owner, and the parties to such an agreement can claim no rights under it.¹¹ This rule, however, does not prevent parties from entering into a bona fide arrangement to purchase property at auction on their joint account, or for other proper purposes.¹²

37 Atl. 885. It has been held, however, in New York, that the secret agreement only is void, and that the preferred creditor may still have the benefit of the composition agreement. *HANOVER NAT. BANK v. BLAKE*, 142 N. Y. 406, 37 N. E. 519, 27 L. R. A. 33, 40 Am. St. Rep. 607. See, also, *White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423, 1 Am. St. Rep. 886; *Cheveront v. Textor*, 53 Md. 295. A secret agreement by a creditor to withdraw his opposition to a bankrupt's discharge, or to a composition, is void; and it does not matter whether it was made with the debtor or with a stranger, *Higgins v. Pitt*, 4 Ex. 312; *KULLMAN v. GREENEBAUM*, supra; nor whether the consideration for such withdrawal is to come out of the debtor's assets or not, *Hall v. Dyson*, 17 Q. B. 785; *KULLMAN v. GREENEBAUM*, supra; and this is true though it be part of the agreement not to prove against the estate at all, *McKewan v. Sanderson*, 20 Eq. 65.

⁹ *Smith v. Greenlee*, 13 N. C. 126, 18 Am. Dec. 564; *Moncrieff v. Goldsborough*, 4 Har. & McH. (Md.) 281, 1 Am. Dec. 407; *Curtis v. Aspinwall*, 114 Mass. 187; *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398; *Pennock's Appeal*, 14 Pa. 446, 53 Am. Dec. 561; *Staines v. Shore*, 16 Pa. 200, 55 Am. Dec. 492.

¹⁰ Otherwise if the bidder, though employed by one interested in the sale, can be compelled by the auctioneer to take the property. *McMillan v. Harris*, 110 Ga. 72, 35 S. E. 334, 48 L. R. A. 345, 78 Am. St. Rep. 93.

¹¹ *GIBBS v. SMITH*, 115 Mass. 592; *Ray v. Mackin*, 100 Ill. 246; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Barton v. Benson*, 126 Pa. 431, 17 Atl. 642, 12 Am. St. Rep. 883; *Gardiner v. Morse*, 25 Me. 140; *Goldman v. Oppenheim*, 118 Ind. 95, 20 N. E. 635; *Wooten v. Hinkle*, 20 Mo. 290; *Atlas Nat. Bank v. Holm*, 71 Fed. 489, 19 C. C. A. 94; *De Baun v. Brand*, 60 N. J. Law, 283, 37 Atl. 726; *Hallam v. Huffman*, 5 Kan. App. 303, 48 Pac. 602; *McClelland v. Bank*, 60 Neb. 90, 82 N. W. 319.

¹² *GIBBS v. SMITH*, 115 Mass. 592; *Smith v. Ulman*, 58 Md. 183, 42 Am. Rep. 329; *Phippen v. Stickney*, 3 Mete. (Mass.) 388; *Garrett v. Moss*, 20 Ill. 549; *Marie v. Garrison*, 83 N. Y. 14; *Small v. Jones*, 1 Watts & S. (Pa.)

Same—Publication of Libel.

Since it is a civil wrong to publish a libelous book or article, even when it does not constitute a crime, an agreement contemplating such a publication is illegal. No action will lie, therefore, to recover compensation for printing or publishing a libelous book, or for breach of a contract to print or publish it, or on an agreement to indemnify against liability for publishing it.¹³ In order to render such a contract illegal, "it should appear that there was an intention on the part of the author and publisher to write and publish libelous matter; or that the author proposed, with the knowledge and acquiescence of the publisher, to write libelous matter; or that the contract on its face provided for or promoted an illegal act."¹⁴

Same—Illegality Distinguished from Fraud.

Fraud is a civil wrong, and an agreement to commit a fraud is an agreement to do an illegal act; but fraud as a civil wrong must be kept apart from fraud as a vitiating element in contract. Fraud may vitiate a contract because it prevents the consent of the other from being genuine; and in such case the contract can be avoided by the party defrauded, because his consent was unreal.

SAME—AGREEMENTS IN BREACH OF STATUTE—CONSTITUTIONAL LAW.

151. The legislature, in the exercise of its police power, may regulate or prohibit the making of contracts.

The United States, or a state, in the exercise of its police power, may regulate or prohibit the making of contracts where, in the judgment of the legislature, the public good requires the restriction, and ordinarily the courts will not review its judgment as to the propriety of the law. There is, however, some limitation to the police power. The federal constitution protects the vested rights of the people, and prohibits congress and the state legislatures from passing any law which shall deprive a citizen of his liberty or property without due process of law. The courts are bound to enforce the constitution even

128; *Id.*, 6 Watts & S. (Pa.) 122; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Kearney v. Taylor*, 15 How. 494, 14 L. Ed. 787; *Wicker v. Hoppock*, 6 Wall. 94, 18 L. Ed. 752; *Barnes v. Morrison*, 97 Va. 372, 34 S. E. 93; *Fidelity Ins. & Safe-Deposit Co. v. Railway Co.* (C. C.) 98 Fed. 475 (agreement by bondholders to purchase on foreclosure).

¹³ *Shackell v. Rosier*, 2 Bing. N. C. 634; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260; *Arnold v. Clifford*, 2 Sumn. 238, Fed. Cas. No. 555; *Ives v. Jones*, 25 N. C. 538, 40 Am. Dec. 421; *Clay v. Yates*, 1 Hurl. & N. 73.

¹⁴ *JEWETT PUB. CO. v. BUTLER*, 159 Mass. 517, 34 N. E. 1087.

as against the legislatures; and if the legislature, assuming to act under the police power of the state, should pass a statute depriving a person of the right to make contracts, where the public good clearly does not require such interference, the statute would be unconstitutional and void.¹⁵ A discussion of the police power and of its limitations, however, in its bearings upon the power of the legislature in this regard, is beyond the scope of this book.

SAME—PROHIBITION BY STATUTE.

152. In determining whether a contract, or an act or omission involved in the performance of a contract, is prohibited by statute, the intention of a legislature must be ascertained, and must govern; and in ascertaining the intention the court will look to the language and subject-matter of the statute, and the evil which it seeks to prevent. Subject to this fundamental rule, the following rules of construction, which are frequently applied, may be stated:

- (a) Where the statute imposes a penalty for an act or omission, this is *prima facie* evidence of intention to prohibit.
- (b) If the object of the penalty is protection of the public, it amounts to a prohibition; but if the object is solely for revenue purposes, the act or omission is not prohibited.

Where it is contended that an agreement is illegal as being in violation of a statute, the question is whether the acts contemplated are prohibited by the statute; and the answer to this question depends upon the construction of the statute. In all cases the intention of the legislature must govern.¹⁶ If a statute was intended to prohibit a particular agreement, or the acts involved in its performance, then that agreement is clearly illegal.

The law does not make any distinction between acts which are *mala in se*, and which for this reason are prohibited by statute, and acts

¹⁵ *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 437, 41 L. Ed. 832; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *People v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; *State v. Scougal*, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354.

¹⁶ *COPE v. ROWLANDS*, 2 Mees. & W. 149; *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; *BOWDITCH v. INSURANCE CO.*, 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474; *AIKEN v. BLAISDELL*, 41 Vt. 655; *Griffith v. Wells*, 3 Denio (N. Y.) 226; *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901; *PANGBORN v. WESTLAKE*, 36 Iowa, 546; *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145; *Lester v. Bank*, 33 Md. 558, 3 Am. Rep. 211; *Ruckman v. Bergholz*, 37 N. J. Law, 437; *McKeever v. Beacom*, 101 Iowa, 173, 70 N. W. 112.

which are mala prohibita, or wrong merely because they are prohibited by statute. If the statute prohibits an act, an agreement involving its commission is illegal, without regard to the ground of prohibition, or the morality or immorality of the act.¹⁷

Prohibition—Effect of Penalty.

A statute may render an agreement illegal by express prohibition or by imposing a penalty without an express prohibition.

Some cases hold that, whenever a statute imposes a penalty for an act or omission, it impliedly prohibits it;¹⁸ but, according to the weight of authority, the imposition of a penalty is only prima facie evidence of an intention to prohibit.¹⁹ The intention of the legislature will always govern, and the court will look to the language and subject-matter of the act and to the evil which it seeks to prevent. A consideration which receives weight is whether the object of the penalty is protection to the public and not merely revenue; for if the penalty is designed to further the interests of public policy, as to protect the public against fraud or imposition, or to protect health or morals, safety or good order, it amounts to a prohibition;²⁰ but if it is designed solely for revenue purposes, a contract in violation of the statute is not necessarily prohibited.²¹ The propriety of applying a different rule to statutes designed for revenue purposes, however, has been ques-

¹⁷ Bank of U. S. v. Owens, 2 Pet. 527, 539, 7 L. Ed. 508; Bensley v. Bignold, 5 Barn. & Ald. 335; Aubert v. Maze, 2 Bos. & P. 371; White v. Buss, 3 Cush. (Mass.) 448; Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; Penn v. Bornman, 102 Ill. 523; Lewis v. Welch, 14 N. H. 294; William Wilcox Mfg. Co. v. Brazos, 74 Conn. 208, 50 Atl. 722.

¹⁸ Miller v. Post, 1 Allen (Mass.) 434; Hallett v. Novion, 14 Johns. (N. Y.) 273, 290; Pray v. Burbank, 10 N. H. 377; Doe v. Burnham, 31 N. H. 426; Durgin v. Dyer, 68 Me. 143; Kleckley v. Leyden, 63 Ga. 215; McConnell v. Kitchens, 20 S. C. 430, 47 Am. Rep. 845; Bacon v. Lee, 4 Iowa, 490; Randall v. Tuell, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143; Sandage v. Manufacturing Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; Edgerly v. Hale, 71 N. H. 138, 51 Atl. 679.

¹⁹ Bensley v. Bignold, 5 Barn. & Ald. 335; COPE v. ROWLANDS, 2 Mees. & W. 149; Griffith v. Wells, 3 Denio (N. Y.) 226; Hunt v. Knickerbacker, 5 Johns. (N. Y.) 327; President, etc., of Springfield Bank v. Merrick, 14 Mass. 322; Siedenbender v. Charles' Adm'rs, 4 Serg. & R. (Pa.) 151, 8 Am. Dec. 682; Penn v. Bornman, 102 Ill. 523. See, also, cases in note 16, supra.

²⁰ COPE v. ROWLANDS, 2 Mees. & W. 149; Cundell v. Dawson, 4 C. B. 376; Griffith v. Wells, 3 Denio, 226; Seidenbender v. Charles' Adm'rs, 4 Serg. & R. 151, 8 Am. Dec. 682; Penn v. Bornman, 102 Ill. 523; BISBEE v. McALLEN, 39 Minn. 143, 39 N. W. 299; Smith v. Robertson (Ky.) 50 S. W. 852, 45 L. R. A. 510.

²¹ Brown v. Duncan, 10 Barn. & C. 93; Larned v. Andrews, 106 Mass. 435, 8 Am. Rep. 346; Corning v. Abbott, 54 N. H. 469; AIKEN v. BLAISDELL, 41 Vt. 655; Ruckman v. Bergholz, 37 N. J. Law, 437; Rahter v. First Nat. Bank, 92 Pa. 393; Mandlebaum v. Gregovich, 17 Nev. 87, 28 Pac. 121; Vermont Loan & Trust Co. v. Hoffman (Idaho) 49 Pac. 314, 37 L. R. A. 509.

tioned.²² Another consideration, which sometimes receives weight, is whether the penalty is recurrent upon every breach of the provisions of the statute; for, if it is recurrent, the inference is that the penalty amounts to a prohibition.²³

The absence of a penalty or the failure of the penal clause in the particular instance will not prevent the court from giving effect to an express prohibition.²⁴

Doing Indirectly What cannot be Done Directly.

What the law forbids to be done directly cannot be made lawful by doing it indirectly.²⁵ Where a bank, for instance, which was itself prohibited from entering into a particular transaction, procured its manager to appear in the transaction for its benefit, it was held that the transaction was unlawful, "upon the principle that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance."²⁶ So, where the charter of a bank forbade the taking of a greater rate of interest than 6 per cent., but did not say that an agreement should be void in which such interest was taken, the supreme court of the United States held that a transaction by which the bank discounted a note at more than 6 per cent. was void, though the charter did not expressly prohibit an "agreement" to take higher interest, but spoke only of "taking," not of "reserving," interest. The court said: "A fraud upon a statute is a violation of the statute. * * * It cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. In those instances in which courts are called upon to inflict a penalty * * * it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offense; but, when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do."²⁷

Same—Agreements Prohibited but Declared not Void.

An agreement forbidden by statute may be saved from being void by the statute itself. Where a statute forbids an agreement, but says

²² See COPE v. ROWLANDS, 2 Mees. & W. 149; Territt v. Bartlett, 21 Vt. 184; AIKEN v. BLAISDELL, 41 Vt. 655.

²³ Ritchie v. Smith, 6 C. B. 462; Anson, Cont. (8th Ed.) 185.

²⁴ Pol. Cont. (3d Ed.) 271; Sussex Peerage Case, 11 Clark & F. 148, 149. See, also, Union Nat. Bank v. Louisville, N. A. & C. Ry. Co., 145 Ill. 208, 34 N. E. 135.

²⁵ Booth v. Bank of England, 7 Clark & F. 509, 540; Bank of U. S. v. Owens, 2 Pet. 527, 536, 7 L. Ed. 508; Wells v. People, 71 Ill. 532.

²⁶ Booth v. Bank of England, *supra*.

²⁷ Bank of U. S. v. Owens, 2 Pet. 527, 7 L. Ed. 508.

that, if made, it shall not be void, then, if made, it is a contract which the courts must enforce.²⁸

Same—Agreements Simply Void and Unenforceable.

Where no penalty is imposed, and the intention of the legislature appears to be simply that the agreement is not to be enforced, neither the agreement itself nor its performance is to be treated as unlawful for any other purpose.²⁹

SAME—PARTICULAR AGREEMENTS IN BREACH OF STATUTE.

153. Among the statutes prohibiting agreements, the following may be mentioned as the most important:

- (a) Statutes regulating the conduct of a particular trade, business, or profession, or regulating dealings in particular articles of commerce.
- (b) Statutes regulating the traffic in intoxicating liquors.
- (c) Statutes prohibiting labor, business, etc., on Sunday.
- (d) Statutes prohibiting the taking of usury.
- (e) Statutes prohibiting gaming and wagers. This head includes statutes prohibiting the buying and selling of stocks or commodities for future delivery, where the parties intend, not an actual delivery, but a settlement by paying the difference between the market and the contract price.³⁰
- (f) Statutes prohibiting lotteries.

Regulating Trade, Profession, or Business.

There are numerous statutes in all of the states, enacted for the purpose of protecting the public in dealing with certain classes of traders or professional men, and with certain articles of commerce. Protection to the public is generally the object of these statutes, and they are construed as prohibiting contracts entered into without having complied with the prescribed conditions. As falling within this class may be mentioned statutes imposing a penalty on dealers who fail to have the weights, measures, or scales used by them approved and sealed by the proper officer. Such a statute is for the protection of the public against fraud and imposition, and amounts to a prohibition of sales in measures or by weights or scales not sealed, so that a dealer who has made such a sale cannot recover the price.³¹

²⁸ Lewis v. Bright, 4 El. & Bl. 917.

²⁹ Post, p. 332.

³⁰ Independently of statute, wagers on subjects in which the parties have no interest are, in this country, generally held illegal, as being contrary to public policy. Post, p. 276.

³¹ Miller v. Post, 1 Allen (Mass.) 434; BISBEE v. McALLEN, 39 Minn. 143, 39 N. W. 299; Finch v. Barclay, 87 Ga. 393, 13 S. E. 566; Eaton v. Kegan, 114 Mass. 433.

Falling within this class are also statutes requiring professional men, such as lawyers, physicians and surgeons, and others, to procure a license, certificate, or diploma as a condition precedent to the right to engage in the practice of their profession. These statutes are intended to protect the public against incompetent and unqualified practitioners, and a person coming within the statute cannot recover for his services if he has not complied with its provisions.³²

There are also, in most of the states, statutes regulating dealings with certain articles of commerce. They are designed either for the protection of the public against fraud or imposition from the sale of a spurious article, or for the protection of the public health against adulterated articles of food, or dangerous substances, such as powder and poisons.³³ Sales of fertilizers, for instance, have been held illegal where the article was not inspected or labeled as required by statute.³⁴

In many of the states there are statutes prohibiting the employment of young children in factories, and a contract for such employment would be illegal, so that a father could not recover for the services of a child so employed.³⁵

³² Lawyers. *Hall v. Bishop*, 3 Daly (N. Y.) 109; *Ames v. Gilman*, 10 Metc. (Mass.) 239; *Hittson v. Brown*, 3 Colo. 304. But see *Yates v. Robertson*, 80 Va. 475; *Harland v. Lillenthal*, 53 N. Y. 438. Physicians and surgeons. *Bailey v. Mogg*, 4 Denio (N. Y.) 60; *Alcott v. Barber*, 1 Wend. (N. Y.) 526; *Orr v. Meek*, 111 Ind. 40, 11 N. E. 787; *Coyle v. Campbell*, 10 Ga. 570; *Puckett v. Alexander*, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; *Davidson v. Bohlman*, 37 Mo. App. 576; *Richardson v. Dorman*, 23 Ala. 679; *Jordan v. Dayton*, 4 Ohio, 295; *Underwood v. Scott*, 43 Kan. 714, 23 Pac. 942; *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567; *Dow v. Haley*, 30 N. J. Law, 354; *Adams v. Stewart*, 5 Har. (Del.) 144; *Haworth v. Montgomery*, 91 Tenn. 16, 18 S. W. 399; *Hargan v. Purdy*, 93 Ky. 424, 20 S. W. 432; *Roberts v. Levy* (Cal.) 31 Pac. 570. Unlicensed real-estate broker. *Buckley v. Humason*, 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423, 36 Am. St. Rep. 637; *Johnson v. Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230. Unlicensed stockbroker. *COPE v. ROWLANDS*, 2 Mees. & W. 149; *Hustis v. Pickards*, 27 Ill. App. 270. School teacher without certificate. *Ryan v. School Dist.*, 27 Minn. 433, 8 N. W. 146; *Wells v. People*, 71 Ill. 532. Unqualified conveyancer. *Taylor v. Gas Co.*, 10 Exch. 293. Unlicensed plumber. *Johnston v. Dahlgren*, 31 App. Div. 204, 52 N. Y. Supp. 555. Innkeeper. *Randall v. Tuell*, 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143. Keeper of stallion. *Smith v. Robertson*, 106 Ky. 472, 50 S. W. 852; *Nelson v. Beck*, 89 Me. 264, 36 Atl. 374.

³³ Sale of oleomargarine. *Waterbury v. Egan* (City Ct. N. Y.) 3 Misc. Rep. 355, 23 N. Y. Supp. 115; *Braun v. Keally*, 146 Pa. 519, 23 Atl. 389, 28 Am. St. Rep. 811.

³⁴ *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Conley v. Sims*, 71 Ga. 161; *Johnston v. McConnell*, 65 Ga. 129; *Baker v. Burton* (C. C.) 31 Fed. 401; *Williams v. Barfield*, Id. 398; *Campbell v. Segars*, 81 Ala. 259, 1 South. 714. Contra, *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720.

³⁵ *Birkett v. Chatterton*, 13 R. I. 299, 43 Am. Rep. 30. Under eight-hour law, making violation of act a misdemeanor, an employé cannot recover for overtime. *Short v. Mining Co.*, 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603.

Further illustrations of statutes within this class are referred to below.³⁸

*Same—Traffic in Intoxicating Liquors.*³⁷

Where a statute in terms prohibits the sale of intoxicating liquors, a contract of sale is of course invalid. Some difficulty has arisen where the statute was not absolutely prohibitory, but merely prescribed certain conditions to be complied with by dealers. An example is where a statute imposes a penalty for selling without a license. It is generally held that such a statute is not merely for purposes of revenue, but is to diminish the evils of intemperance, and prevent disreputable and objectionable persons from engaging in the business, and that sales without a license are prohibited and rendered illegal.³⁸

Somewhat in line with these statutes are those which regulate the conduct of saloons, such as statutes prohibiting billiard tables, bowling alleys, etc., in connection with a saloon. An agreement in breach of such a statute is illegal. A carpenter, for instance, cannot recover the price of erecting a bowling alley in a building appurtenant to a tavern, where a statute prohibits it from being so kept.³⁹

So, also, under a statute imposing a penalty on any person owning or controlling any premises who shall suffer them to be used for the sale of spirituous liquors, a person who owns a building, and has knowledge that his tenant at will is using the premises for the sale of spirituous liquors, and who permits him to continue in possession, cannot recover for use and occupation.⁴⁰

Contracts in Breach of Sunday Laws.

The common law does not prohibit the making of contracts on Sunday, and, in the absence of statutory prohibition, such contracts are

³⁶ Loan by pawnbroker who has neglected to comply with statute. *Fergusson v. Norman*, 5 Bing. N. C. 76. Failure of printer to print his name on the work as required by statute. *Bensley v. Bignold*, 5 Barn. & Ald. 335. Unlicensed peddlers. *Stewartson v. Lothrop*, 12 Gray (Mass.) 52. Agreement to construct building not complying with building regulations. *Stevens v. Gourley*, 7 C. B. (N. S.) 99; *Burger v. Roelsch*, 77 Hun, 44, 28 N. Y. Supp. 460. Failure to measure wood sold, as required by statute. *Pray v. Burbank*, 10 N. H. 377. Agreement for threshing grain, where machine is not boxed as required by a statute, intended to prevent injury to workmen. *Dillon v. Allen*, 46 Iowa, 299, 26 Am. Rep. 145. Sale of shingles not of size prescribed. *Wheeler v. Russell*, 17 Mass. 258.

³⁷ On this subject, see *Black, Intox. Liq.* §§ 242-276.

³⁸ *Griffith v. Wells*, 3 Denio (N. Y.) 226; *Territt v. Bartlett*, 21 Vt. 184; *AIKEN v. BLAISDELL*, 41 Vt. 655; *O'Bryan v. Fitzpatrick*, 48 Ark. 487, 3 S. W. 527; *Vannoy v. Patton*, 5 B. Mon. (Ky.) 248; *Solomon v. Dreschler*, 4 Minn. 278 (Gil. 197); *Lewis v. Welch*, 14 N. H. 294; *Cobb v. Billings*, 23 Me. 470; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *Bach v. Smith*, 2 Wash. T. 145, 3 Pac. 831.

³⁹ *Spurgeon v. McElwain*, 6 Ohio, 442, 27 Am. Dec. 266.

⁴⁰ *Mitchell v. Scott*, 62 N. H. 596. Post, p. 328.

as valid as if made on any other day.⁴¹ In most states, however, statutes have been enacted on the subject.⁴²

Where the statute expressly prohibits the making of contracts on Sunday, and declares that they shall be void, there should be no difficulty in applying it;⁴³ and, if a statute prohibits servile work and labor on Sunday, there can of course be no recovery for such work.⁴⁴

Where it is provided that no person shall do any labor, work, or business on Sunday, all secular business is prohibited. Not only would a contract to do work on Sunday, made on some other day, be illegal because of the object, but a contract made on Sunday to work on another day would be likewise prohibited. The making of a contract is secular business, within the meaning of the statute.⁴⁵ But where the prohibition is only against servile work and labor, the making of contracts, including the execution of commercial paper, is not generally regarded as included.⁴⁶ Again, if the prohibition is confined to

⁴¹ *Story v. Elliott*, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423; *Sayles v. Smith*, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117; *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Bloom v. Richards*, 2 Ohio St. 387; *Swann v. Swann* (C. C.) 21 Fed. 299; *Adams v. Gay*, 19 Vt. 358; *Brown v. Browning*, 15 R. I. 422, 7 Atl. 403, 2 Am. St. Rep. 908.

⁴² Sunday laws are not an unconstitutional interference with the religious liberty of the people. *State v. O'Rourke*, 35 Neb. 614, 53 N. W. 591, 17 L. R. A. 830; *State v. Judge*, 39 La. Ann. 132, 1 South. 437; *Scales v. State*, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768; *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 636, 44 L. Ed. 716; *Hennington v. State*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; *State v. Powell*, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854.

⁴³ *Burns v. Moore*, 76 Ala. 339, 52 Am. Rep. 332. In Maine, and probably in some of the other states, the statute provides that the defense that a contract was executed on Sunday cannot be made to an action thereon unless the consideration is returned. *Wentworth v. Woodside*, 79 Me. 156, 8 Atl. 763; *First Nat. Bank v. Kingsley*, 84 Me. 111, 24 Atl. 794; *Wheelden v. Lyford*, 84 Me. 114, 24 Atl. 793.

⁴⁴ *Watts v. Van Ness*, 1 Hill (N. Y.) 76.

⁴⁵ *Northrup v. Foot*, 14 Wend. (N. Y.) 248; *Pattee v. Greely*, 13 Metc. (Mass.) 284; *Towle v. Larrabee*, 26 Me. 464; *Lyon v. Strong*, 6 Vt. 219; *Varney v. French*, 19 N. H. 233; *Nibert v. Baghurst*, 47 N. J. Eq. 201, 20 Atl. 252; *Id.*, 25 Atl. 474; *Calhoun v. Phillips*, 87 Ga. 482, 13 S. E. 593; *Goss v. Whitney*, 27 Vt. 272; *Kepner v. Keefer*, 6 Watts (Pa.) 231, 31 Am. Dec. 460; *Smith v. Railway Co.*, 83 Wis. 271, 50 N. W. 497; *Brazee v. Bryant*, 50 Mich. 136, 15 N. W. 49; *Durant v. Rhener*, 26 Minn. 362, 4 N. W. 610. A notice to a tenant. *Cannon v. Ryan*, 49 N. J. Law, 314, 8 Atl. 293. Indorsement of note. *First Nat. Bank v. Kingsley*, 84 Me. 111, 24 Atl. 794. Selling of soda water by a druggist is "worldly employment." *Splane v. Commonwealth* (Pa. Sup.) 12 Atl. 431. Extension of time of payment of debt. *Rush v. Rush* (N. J. Ch.) 18 Atl. 221. Casual execution of note is not "labor." *Holden v. O'Brien*, 86 Minn. 297, 90 N. W. 531.

⁴⁶ *Birks v. French*, 21 Kan. 238; *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Boynton v. Page*, 13 Wend. (N. Y.) 425. Contra, *REYNOLDS v. STEVENSON*, 4 Ind. 619; *Link v. Clemmens*, 7 Blackf. (Ind.) 479. Sale of tickets by manager of theater, and superintending Sunday performance, is

labor, business, or work of a man's "ordinary calling," contracts or other business or work on Sunday by a person is not illegal unless it is within his ordinary calling.⁴⁷ A real-estate broker or lawyer, therefore, would not violate the statute by purchasing or selling a horse on Sunday. If the statute prohibits the exposure of merchandise for sale on Sunday, the prohibition extends only to public sales, and does not prevent private contracts of sale without such exposure.⁴⁸

Same—Works of Necessity or Charity.

In all of the states the statutes expressly except from the prohibition works of necessity or charity, but as to what constitutes a work of necessity or charity the authorities are somewhat conflicting. As a rule, whatever must be done in order to preserve life or health⁴⁹ or property,⁵⁰ and must be done on Sunday if done at all, is a work of necessity.⁵¹ If property is in imminent danger, work may be done

"laboring." *Quarles v. State*, 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192. Running excursion steamboat is "worldly employment." *Commonwealth v. Rees*, 10 Pa. Co. Ct. R. 545. Acknowledgment of debt barred by statute of limitations. *Thomas v. Hunter*, 29 Md. 406. Athletic games and sports are not within the prohibition against labor. *St. Louis Agr. & Mech. Ass'n v. Delano*, 37 Mo. App. 284; *Id.*, 108 Mo. 217, 18 S. W. 1101.

⁴⁷ *Hazard v. Day*, 14 Allen (Mass.) 487, 92 Am. Dec. 790 (construing the Rhode Island statute); *Allen v. Gardner*, 7 R. I. 22; *Amis v. Kyle*, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463; *Sanders v. Johnson*, 29 Ga. 526; *Mills v. Williams*, 16 S. C. 593; *Hellams v. Abercrombie*, 15 S. C. 110, 40 Am. Rep. 684; *Swann v. Swann* (C. C.) 21 Fed. 299.

⁴⁸ *Boynton v. Page*, 13 Wend. (N. Y.) 425; *Batsford v. Every*, 44 Barb. (N. Y.) 618. See, also, *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965. But public exposure and sale of newspapers is within the statute. *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302.

⁴⁹ *Smith v. Watson*, Page, 13 Wend. (N. Y.) 332; *Aldrich v. Blackstone*, 128 Mass. 148.

⁵⁰ *Johnson v. People*, 42 Ill. App. 594 (reaping field of grain); *Whitcomb v. Gillman*, 35 Vt. 297; *Parmelee v. Wilks*, 22 Barb. (N. Y.) 539; *State v. McBee*, 52 W. Va. 257, 43 S. E. 121.

⁵¹ "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute." *Flagg v. Inhabitants*, 4 Cush. (Mass.) 243. And see *Burns v. Moore*, 76 Ala. 339, 52 Am. Rep. 332. The following contracts have been held to be within the exceptions: Contract securing indemnity from an absconding debtor pursued and overtaken on Sunday. *Hooper v. Edwards*, 18 Ala. 280. Repairing railroad tracks. *Yonoski v. State*, 79 Ind. 393, 41 Am. Rep. 614. Bail bond. *Hammons v. State*, 59 Ala. 164, 31 Am. Rep. 13. Repairing defect in highway. *Flagg v. Inhabitants*, supra. Shoeing horses used in carrying mail. *Nelson v. State*, 25 Tex. App. 599, 8 S. W. 927. Loading vessel where there is danger of navigation closing. *McGatrick v. Wason*, 4 Ohio St. 566. Pumping oil well; whether a work of necessity is a question of fact. *Commonwealth v. Gillespie*, 146 Pa. 546, 23 Atl. 393. Transportation of cattle by a railroad company, so that it cannot excuse itself for delay on the ground that the delay was on Sunday. *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415. Riding for exercise.

on Sunday to save it. If, however, the work is only to prevent loss on a secular day, as where a mill wheel is cleaned on Sunday because to do so on another day will make it necessary to shut down and stop work for the purpose, it is not a work of necessity.⁵² Any act connected with religious worship,⁵³ or for the relief of suffering or distress,⁵⁴ is an act of charity, and may be performed on Sunday.

Same—Incomplete Transactions.

The fact that negotiations are carried on, and the terms of a contract agreed upon, on Sunday, where the contract is not really made until a week day, does not render the contract illegal.⁵⁵ A promissory

Sullivan v. Railroad Co., 82 Me. 196, 19 Atl. 169, 8 L. R. A. 427. Telegram from husband to wife explaining absence. *Burnett v. Telegraph Co.*, 39 Mo. App. 599. Telegram to physician. *W. U. Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113. Telegram announcing death of father. *W. U. Tel. Co. v. Wilson*, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23. Transaction of business by benefit association. *Pepin v. Société* (R. I.) 54 Atl. 47, 60 L. R. A. 626. The following have been held not within the exception: Note given to procure discharge of person arrested on charge of bastardy. *Shippy v. Eastwood*, 9 Ala. 198. Telegram respecting ordinary business affairs. *W. U. Tel. Co. v. Yopst* (Ind. Sup.) 11 N. E. 16. Publication and sale of newspaper. *HANDY v. PUBLISHING CO.*, 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; *Commonwealth v. Matthews*, 12 Pa. Co. Ct. R. 149, 22 Pittsb. Leg. J. (N. S.) 309; *Id.*, 152 Pa. 166, 25 Atl. 548, 18 L. R. A. 761. Shaving and cutting or dressing hair by a barber. *Phillips v. Innes*, 4 Clark & F. 234; *State v. Schuler*, 23 Wkly. Law Bul. 450; *State v. Sopher*, 25 Utah, 318, 71 Pac. 482, 60 L. R. A. 468. But see, contra, *Ungericht v. State*, 119 Ind. 379, 21 N. E. 1082, 12 Am. St. Rep. 419; *Stone v. Graves*, 145 Mass. 353, 13 N. E. 906. Sale of meat by butcher. *Arnheiter v. State*, 115 Ga. 572, 41 S. E. 989, 58 L. R. A. 392. Tobacco is not within exception allowing sale of "drugs or medicines, provisions, or other articles of immediate necessity." *State v. Ohmer*, 34 Mo. App. 115.

⁵² *McGrath v. Merwin*, 112 Mass. 467, 12 Am. Rep. 119. And see, to the same effect, *Hamilton v. Austin*, 62 N. H. 575. Contra, *Hennersdorf v. State*, 25 Tex. App. 597, 8 S. W. 926, 8 Am. St. Rep. 448.

⁵³ Church subscriptions made on Sunday are enforceable, see *Allen v. Duffie*, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; *Bryan v. Watson*, 127 Ind. 42, 26 N. E. 666, 11 L. R. A. 63; *Dale v. Knepp*, 98 Pa. 389, 38 Am. Rep. 165, note, 42 Am. Rep. 624; *Hodges v. Nalty*, 113 Wis. 567, 89 N. W. 535. But see *Catlett v. Trustees*, 62 Ind. 365, 30 Am. Rep. 197. Where a carriage is hired on Sunday, the contract is not made legal "because the hirer did a kind act by conveying a young lady home who had been 'to meeting' during the day." *TILLOCK v. WEBB*, 56 Me. 100.

⁵⁴ *Buck v. City of Biddeford*, 82 Me. 433, 19 Atl. 912.

⁵⁵ *Taylor v. Young*, 61 Wis. 314, 21 N. W. 408; *McKinnis v. Estes*, 81 Iowa, 749, 46 N. W. 987; *Tuckerman v. Hinkey*, 9 Allen (Mass.) 452; *Dickinson v. Richmond*, 97 Mass. 45; *Love v. Wells*, 25 Ind. 503, 87 Am. Dec. 375; *Uhler v. Applegate*, 26 Pa. 140; *Beitenman's Appeal*, 55 Pa. 183; *Meriwether v. Smith*, 44 Ga. 541; *Bryant v. Booze*, 55 Ga. 438; *Tyler v. Waddington*, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; *Merrill v. Downs*, 41 N. H. 72; *Stackpole v. Symonds*, 23 N. H. 229; *Moseley v. Vanhooser*, 6 Lea (Tenn.) 286, 40 Am. Rep. 37; *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230. That bill of sale

note, for instance, or a deed, though written and signed on Sunday, is valid if delivered on Monday, since it does not take effect until delivery;⁵⁶ and a sale of goods, though the negotiations are on Sunday, is valid if the goods are not set apart and delivered until Monday.⁵⁷

Same—Ratification.

Whether a contract made on Sunday is capable of ratification is a question on which there is much conflict of authority. Upon principle, it seems that the contract, being void in its inception, is incapable of ratification, and many cases so hold.⁵⁸ There is a tendency, however, to avoid the hardship resulting from the invalidity of such contracts, and many cases declare that such contracts are capable of ratification.⁵⁹ Where the contract is one of sale or exchange accompanied by actual delivery, there is authority to the effect that the property does not pass, and that the seller may maintain replevin⁶⁰ or trover;⁶¹ in

is made on Sunday, in pursuance of sale made on previous day, does not invalidate sale. *Foster v. Wooten*, 67 Miss. 540, 7 South. 501. But see *Hanchett v. Jordan*, 43 Minn. 149, 45 N. W. 617.

⁵⁶ *King v. Fleming*, 72 Ill. 21, 22 Am. Rep. 131; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331; *Hill v. Dunham*, 7 Gray (Mass.) 543; *Stacey v. Kemp*, 97 Mass. 166; *Lovejoy v. Whipple*, 18 Vt. 379, 46 Am. Dec. 157; *Hilton v. Houghton*, 35 Me. 143; *Gibbs & Sterrett Mfg. Co. v. Brucker*, 111 U. S. 597, 4 Sup. Ct. 572, 28 L. Ed. 534; *Schwab v. Rigby*, 38 Minn. 395, 38 N. W. 101; *Dohoney v. Dohoney*, 7 Bush (Ky.) 217; *Beman v. Wessels*, 53 Mich. 549, 19 N. W. 179; *Wilson v. Winter* (C. C.) 6 Fed. 16. So, where one of two partners executes an assignment on Sunday, but the other partner executes and delivers it on a secular day, the instrument is valid. *Farwell v. Webster*, 71 Wis. 485, 37 N. W. 437.

⁵⁷ *Rosenblatt v. Townsley*, 73 Mo. 536; *Banks v. Werts*, 13 Ind. 203.

⁵⁸ *Day v. McAllister*, 15 Gray (Mass.) 433; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; *TILLOCK v. WEBB*, 56 Me. 100; *Plaisted v. Palmer*, 63 Me. 576; *Kountz v. Price*, 40 Miss. 341; *Grant v. McGrath*, 56 Conn. 333, 15 Atl. 370; *Vinz v. Beatty*, 61 Wis. 645, 21 N. W. 787; *Riddle v. Keller*, 61 N. J. Eq. 513, 48 Atl. 818; *Acme Electrical, etc., Co. v. Van Derbeek*, 127 Mich. 341, 86 N. W. 786; *Tennent-Stribling Shoe Co. v. Roper*, 94 Fed. 738, 36 C. C. A. 455.

⁵⁹ *Russell v. Murdock*, 79 Iowa, 101, 44 N. W. 237, 18 Am. St. Rep. 348; *Kuhns v. Gates*, 92 Ind. 66; *Adams v. Gay*, 19 Vt. 358; *Parker v. Pitts*, 73 Ind. 597, 38 Am. Rep. 155; *Banks v. Werts*, 13 Ind. 203; *Gwinn v. Simes*, 61 Mo. 335; *Wilson v. Milligan*, 75 Mo. 41; *Campbell v. Young*, 9 Bush (Ky.) 245; *Williamson v. Brandenburg*, 6 Ind. App. 97, 32 N. E. 1022; *Sumner v. Jones*, 24 Vt. 317; *Flinn v. St. John*, 51 Vt. 334; *Schmidt v. Thomas*, 75 Wis. 529, 44 N. W. 771; *Van Hoven v. Irish* (C. C.) 10 Fed. 13, 3 McCrary, 443; *Cook v. Forker*, 193 Pa. 461, 44 Atl. 560, 74 Am. St. Rep. 699.

⁶⁰ *Tucker v. Mowray*, 12 Mich. 378; *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476. See, also, *Magee v. Scott*, 9 Cush. 148, 55 Am. Dec. 49. *Contra*, *Smith v. Bean*, 15 N. H. 577, 578; *Kinney v. McDermott*, 55 Iowa, 674, 8 N. W. 656. See, also, *SIMPSON v. NICHOLS*, 3 M. & W. 244, as corrected in 5 M. & W. 702 (questioning *Williams v. Paul*, 6 Bing. 653).

⁶¹ *Ladd v. Rogers*, 11 Allen, 209. See, also, *Myers v. Meinrath*, 101 Mass. 366, 369, 3 Am. Rep. 368; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Cranson v. Goss*, Id. 439, 441, 9 Am. Rep. 45.

which case it seems that a sufficient consideration for a new promise to pay may be found in the consent of the seller to the transfer of the property at the time of such promise; the liability of the promisor resting, however, upon a new contract, and not upon the ratification of the original contract.⁶² So, if a sale is made on Sunday, but the goods are not delivered until a week day, the buyer is liable, not upon the original promise, but upon an implied promise to pay for the goods.⁶³ A contract made on a previous day cannot be rescinded on Sunday.⁶⁴

Usury.

At common law a man could contract for and recover any amount of interest for a loan of money that the borrower might be willing to give; but, to protect persons in necessity against unconscionable exactions, usury laws have been enacted in most of the states, prescribing a legal rate of interest.

In some states the contract in which usury is charged is declared void. In many states the contract is not void, but the entire interest is forfeited. In other states only the excess of interest charged is forfeited; the legal amount is nevertheless recoverable.

Difficult questions arise in determining what amounts to usury. The following general rules may be stated: In the first place there must be a lending and borrowing of money. If it is so understood by the parties, no shifting or contrivance for the purpose of disguising the real nature of the transaction can avail to evade the statute; and, on the other hand, if it was not a borrowing and lending, it cannot be brought within the statute.⁶⁵ The parties to a contract, for instance,

⁶² *Winfield v. Dodge*, 45 Mich. 355, 7 N. W. 906, 40 Am. Rep. 476; *Haacke v. Knights of Liberty*, 76 Md. 429, 25 Atl. 422; *Brewster v. Banta*, 66 N. J. Law, 367, 49 Atl. 718. An action may be maintained on a new promise. *Williams v. Paul*, 6 Bing. 653; *Harrison v. Colton*, 31 Iowa, 16; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605. See *Winchell v. Cary*, 115 Mass. 560, 15 Am. Rep. 151. *Contra*, *Bontelle v. Melendy*, 19 N. H. 196, 49 Am. Dec. 152; *Kountz v. Price*, 40 Miss. 341.

⁶³ *Bradley v. Rea*, 14 Allen, 20; *Id.*, 103 Mass. 188, 4 Am. Rep. 524; *Hopkins v. Stefan*, 77 Wis. 45, 45 N. W. 676; *Flynn v. Columbus Club*, 21 R. I. 534, 45 Atl. 551; *Bollin v. Hooper*, 86 Mich. 287, 86 N. W. 795. The delivery must be accompanied by circumstances showing new contract. *Aspell v. Hosbein*, 98 Mich. 117, 57 N. W. 27. Defendant, who was indebted to plaintiff, agreed on Sunday to furnish a laborer on Monday to help plaintiff's son thresh, on plaintiff's account, which he did, and the son paid plaintiff a sum, which the latter placed to defendant's credit. Held, that the transaction on Monday did not show the elements of a contract without relying on the Sunday transaction, and hence was not sufficient to take the account out of the statute of limitations. *Pillen v. Erickson*, 125 Mich. 68, 83 N. W. 1023.

⁶⁴ *Benedict v. Batchelder*, 24 Mich. 425, 9 Am. Rep. 130.

⁶⁵ *Tyson v. Rickard*, 3 Har. & J. (Md.) 109, 5 Am. Dec. 424; *Price v. Campbell*, 2 Call (Va.) 110, 1 Am. Dec. 535; *Ferguson v. Sutphen*, 3 Gilman (Ill.)

may agree on a sum as stipulated damages in case of breach, and it may be recovered, though it exceeds the legal interest on the value of property which should have been paid.⁶⁶ So, also, on a loan of chattels, the agreed compensation may be recovered, though it exceeds what would be the legal rate of interest on the value of the chattel;⁶⁷ and, after a negotiable instrument has been executed and delivered, it is not usury for a person to buy it from the holder at a discount greater than the legal rate of interest, except, according to some opinions, in the case of accommodation paper.⁶⁸ In neither of these cases is there a loan or forbearance of money.⁶⁹ As already said, however, the contract must be made bona fide, and not as a cover for a loan.⁷⁰

547; *Osborn v. McCowen*, 25 Ill. 218; *Struthers v. Drexel*, 122 U. S. 487, 7 Sup. Ct. 1293, 30 L. Ed. 1216; *Gaither v. Clarke*, 67 Md. 18, 8 Atl. 740; *Hartman v. Uhlinger*, 115 Pa. 270, 8 Atl. 244; *Lukens v. Hazlett*, 37 Minn. 441, 35 N. W. 265; *Pope v. Marshall*, 78 Ga. 635, 4 S. E. 116; *Drury v. Wolfe*, 34 Ill. App. 23; *Id.*, 134 Ill. 294, 25 N. E. 626. Money paid above the legal rate for the forbearance of an existing debt is usury. *Hathaway v. Hagan*, 59 Vt. 75, 8 Atl. 678. Charging "banker's commission." *Bowdoin v. Hammond*, 79 Md. 173, 28 Atl. 769. An agreement by which a party lends bonds and the borrower agrees to pay to the owner the interest paid by the government, and 6 per cent. in addition, is not a contract for the loan of money. *Marshall v. Rice*, 85 Tenn. 502, 3 S. W. 177. Loans by building and loan association. *Jackson v. Cassidy*, 68 Tex. 282, 4 S. W. 541; *Tilley v. Association (C. C.)* 52 Fed. 618; *Succession of Latchford*, 42 La. Ann. 529, 7 South. 628; *Hensel v. Association*, 85 Tex. 215, 20 S. W. 116; *International Bldg. & Loan Ass'n v. Abbott*, 85 Tex. 220, 20 S. W. 118; *Sullivan v. Association*, 70 Miss. 94, 12 South. 590; *Reeve v. Association*, 56 Ark. 335, 19 S. W. 917, 18 L. R. A. 129; *Iowa Savings & Loan Ass'n v. Heidt*, 107 Iowa, 356, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. Rep. 197; *Washington Nat. Building, Loan & Investment Ass'n v. Stanley*, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793. Four things, it is said, are necessary to constitute usury: (1) A loan, express or implied; (2) an understanding between the parties that the money shall be or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid, or agreed to be paid; and (4) a corrupt intent to take more than the legal rate for the use of the sum loaned. *Balfour v. Davis*, 14 Or. 47, 12 Pac. 89.

⁶⁶ *Tardeveau v. Smith's Ex'r*, *Hardin (Ky.)* 175; *Blackburn v. Hayes*, 59 Ark. 366, 27 S. W. 240.

⁶⁷ *Hall v. Haggart*, 17 Wend. (N. Y.) 280; *Bull v. Rice*, 5 N. Y. 315.

⁶⁸ *Lloyd v. Keach*, 2 Conn. 175, 7 Am. Dec. 256; *Nichols v. Fearson*, 7 Pet. 103, 8 L. Ed. 623; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Cram v. Hendricks*, 7 Wend. (N. Y.) 569; *Jackson v. Travis*, 42 Minn. 438, 44 N. W. 316; *Holmes v. Bank*, 53 Minn. 350, 55 N. W. 555; *Claffin v. Boorum*, 122 N. Y. 385, 25 N. E. 360; *Chase Nat. Bank v. Faurot (Sup.)* 25 N. Y. Supp. 447; *Rodecker v. Littauer*, 59 Fed. 857, 8 C. C. A. 320. There is some conflict of opinion on this question. See *Dickerman v. Day*, 31 Iowa, 444, 7 Am. Rep. 156 (collecting authorities).

⁶⁹ See, also, *Truby v. Mosgrove*, 118 Pa. 89, 11 Atl. 806, 4 Am. St. Rep. 575; *Appeal of Trine (Pa.)* 13 Atl. 765; *Union Cent. Life Ins. Co. v. Hilliard*, 63

⁷⁰ See note 70 on following page.

It has also been held that if a person agrees to pay a specific sum, exceeding the lawful interest, provided he does not pay the principal by a day certain, it is not usury, since by a punctual payment of the principal he may avoid the payment of the sum stated, which is considered as a penalty;⁷¹ and, further, that where a loan is made, to be returned at a fixed day, with more than the legal rate of interest, depending on a casualty which hazards both principal and interest, the contract is not usurious; but where the interest, only, is hazarded, it is usury.⁷²

As to whether it is usury to charge compound interest,—that is, interest upon overdue interest,—the decisions are conflicting, but according to the weight of authority it is not so regarded; but interest cannot be charged on interest not due.⁷³ It is not usury to provide

Ohio St. 478, 59 N. E. 231, 53 L. R. A. 462, 81 Am. St. Rep. 644. If a person sells chattels or land on credit, the fact that he charged a larger sum than he would have charged if he had sold for cash does not render the transaction usurious. *Bull v. Rice*, 5 N. Y. 315; *Brooks v. Avery*, 4 N. Y. 225; *Gilmore v. Ferguson*, 28 Iowa, 220; *Swayne v. Riddle*, 37 W. Va. 291, 16 S. E. 512; *Brown v. Gardner*, 4 Lea (Tenn.) 145; *Graeme v. Adams*, 23 Grat. (Va.) 225, 14 Am. Rep. 130; *Wheeler v. Marchbanks*, 32 S. C. 594, 10 S. E. 1011; *Bass v. Patterson*, 68 Miss. 310, 8 South. 849, 24 Am. St. Rep. 279. Contra, *Fisher v. Hoover*, 3 Tex. Civ. App. 81, 21 S. W. 930. Where on a purchase of land the vendee agrees to pay, as part of the price, on deferred payments in excess of the legal rate, the contract is not usurious. *Askin v. Lebus* (Ky.) 4 S. W. 305; *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375, 6 L. R. A. 427; *Dykes v. Bottoms*, 101 Ala. 390, 13 South. 582. For other cases in which it has been held that the relation of borrower and lender did not exist, see *Appeal of Donehoo* (Pa.) 15 Atl. 924; *Niebuhr v. Schreyer* (Com. Pl.) 13 N. Y. Supp. 809; *McComb v. Association*, 134 N. Y. 598, 31 N. E. 613; *Duval v. Neal*, 70 Miss. 288, 12 South. 145; *Eddy's Ex'r v. Northup* (Ky.) 23 S. W. 353. Sale or loan. *Ellenbogen v. Griffey*, 55 Ark. 268, 18 S. W. 126. Sale below par of city bonds bearing highest rate of interest not usurious. *City of Memphis v. Bethel* (Tenn.) 17 S. W. 191.

⁷⁰ *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833. Discount of paper as cover for loan. *Churchill v. Suter*, 4 Mass. 156; *Jones v. Hake*, 2 Johns. Cas. (N. Y.) 60; *Wilkie v. Roosevelt*, 3 Johns. Cas. (N. Y.) 66; *Clafin v. Boorum*, 122 N. Y. 385, 25 N. E. 360.

⁷¹ *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Gambril v. Doe*, 8 Blackf. (Ind.) 140, 44 Am. Dec. 760; *Fisher v. Anderson*, 25 Iowa, 28, 95 Am. Dec. 761; *Righter v. Warehouse Co.*, 99 Pa. 289; *McNairy v. Bell*, 1 Yerg. (Tenn.) 502, 24 Am. Dec. 454; *Walker v. Abt*, 83 Ill. 226; *Ramsey v. Morrison*, 39 N. J. Law, 591; *Conrad v. Gibbon*, 29 Iowa, 120; *Hackberry v. Shaw*, 11 Ind. 392; *Rogers v. Sample*, 33 Miss. 310, 69 Am. Dec. 349. But see *Carroll Co. Sav. Bank v. Strother*, 28 S. C. 504, 6 S. E. 313; *Connecticut Mut. Life Ins. Co. v. Westerhoff*, 58 Neb. 379, 78 N. W. 724; *Linton v. Insurance Co.*, 104 Fed. 584, 44 C. C. A. 54.

⁷² *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Truby v. Mosgrove*, 118 Pa. 89, 11 Atl. 806, 4 Am. St. Rep. 575; *Thorndike v. Stone*, 11 Pick. (Mass.) 183; *Wilson v. Kilburn*, 1 J. J. Marsh. (Ky.) 494; *Spencer v. Tilden*, 5 Cow. (N. Y.) 144; *Helst v. Blaisdell*, 198 Pa. 377, 48 Atl. 259.

⁷³ *Stewart v. Petree*, 55 N. Y. 621; *Culver v. Bigelow*, 43 Vt. 249; *Quimby*

for payment of an attorney's fee if the debt has to be collected by suit;⁷⁴ nor to require payment in advance of the highest legal rate;⁷⁵ nor, under some circumstances, to pay a broker a commission, or for expenses, for procuring the loan,⁷⁶ provided, as in other cases, it is not

v. Cook, 10 Allen (Mass.) 32; Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265; Austin v. Bacon, 28 Wis. 416; Taylor v. Hiestand, 46 Ohio St. 345, 20 N. E. 345; Gilmore v. Bissell, 124 Ill. 488, 16 N. E. 925; Brown v. Vandyke, 8 N. J. Eq. 795, 55 Am. Dec. 250; Keiser v. Decker, 29 Neb. 92, 45 N. W. 272; Telford v. Garrels, 132 Ill. 550, 24 N. E. 573; Hale v. Hale, 1 Cold. (Tenn.) 233, 78 Am. Dec. 490; Ginn v. Security Co., 92 Ala. 135, 8 South. 388; Brown v. Bank, 86 Iowa, 527, 53 N. W. 410. See, for distinctions, Cox v. Brookshire, 76 N. C. 314; Simpson v. Evans, 44 Minn. 419, 46 N. W. 908; Kimbrough v. Lukins, 70 Ind. 373; Drury v. Wolfe, 134 Ill. 294, 25 N. E. 626; Leonard v. Patton, 106 Ill. 99; Mathews v. Toogood, 23 Neb. 536, 37 N. W. 265, 8 Am. St. Rep. 131; Hochmark v. Richler, 16 Colo. 263, 26 Pac. 818; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99. In some jurisdictions, however, the courts have refused to allow recovery of interest on the ground that it savored of usury, and was contrary to the policy of the law. See Bowman v. Neely, 151 Ill. 37, 37 N. E. 840; Wilcox v. Howland, 23 Pick. (Mass.) 167; Henry v. Flagg, 13 Metc. (Mass.) 64; Cox v. Smith, 1 Nev. 133, 90 Am. Dec. 476; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99.

⁷⁴ Weatherby v. Smith, 30 Iowa, 131, 6 Am. Rep. 663; Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99; Williams v. Flowers, 90 Ala. 136, 7 South. 439, 24 Am. St. Rep. 772; Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265; Smith v. Silvers, 32 Ind. 321; First Nat. Bank v. Canatsey, 34 Ind. 149; National Bank of Athens v. Danforth, 80 Ga. 55, 7 S. E. 546; Shelton v. Aultman & Taylor Co., 82 Ala. 315, 8 South. 232; Fowler v. Trust Co., 141 U. S. 411, 12 Sup. Ct. 8, 35 L. Ed. 794. Otherwise by statute in some states.

⁷⁵ Parker v. Cousins, 2 Grat. (Va.) 372, 44 Am. Dec. 388; Telford v. Garrels, 132 Ill. 550, 24 N. E. 573; Meyer v. Muscatine, 1 Wall. 384, 17 L. Ed. 564; Yahlberg v. Keaton, 51 Ark. 534, 11 S. W. 878, 4 L. R. A. 462, 14 Am. St. Rep. 73; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Fowler v. Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; English v. Smock, 34 Ind. 115, 7 Am. Rep. 215; Newell v. Bank, 12 Bush (Ky.) 57; Rose v. Munford, 36 Neb. 148, 54 N. W. 129; Hawks v. Weaver, 46 Barb. (N. Y.) 164; Mackenzie v. Flannery, 90 Ga. 590, 16 S. E. 710.

⁷⁶ Suydam v. Westfall, 4 Hill (N. Y.) 211; Matthews v. Coe, 70 N. Y. 239, 26 Am. Rep. 583; Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265; Boardman v. Taylor, 66 Ga. 638; Haldeman v. Insurance Co., 120 Ill. 390, 11 N. E. 526; New England Mortgage Security Co. v. Gay (C. C.) 33 Fed. 636; Thomas v. Miller, 39 Minn. 339, 40 N. W. 358; Baird v. Millwood, 51 Ark. 548, 11 S. W. 881; Cockle v. Flack, 93 U. S. 344, 23 L. Ed. 949; Pass v. Security Co., 66 Miss. 365, 6 South. 239; Hughes v. Griswold, 82 Ga. 299, 9 S. E. 1092; Hall v. Daggett, 6 Cow. (N. Y.) 653; Nourse v. Prime, 7 Johns. Ch. (N. Y.) 69; Telford v. Garrels, 132 Ill. 550, 24 N. E. 573; Ginn v. Security Co., 92 Ala. 135, 8 South. 388; White v. Dwyer, 31 N. J. Eq. 40; Davis v. Sloman, 27 Neb. 877, 44 N. W. 41; Weems v. Jones, 86 Ga. 760, 13 S. E. 89. Even the lender, it has been held, may charge for extra services and expenses, for, to constitute usury, the charge must be for the loan or forbearance. Atlanta Mining & Rolling Mill Co. v. Gwyer, 48 Ga. 9; Morton v. Thurber, 85 N. Y. 550; Ammondson v. Ryan, 111 Ill. 506; De Forest v. Strong, 8 Conn. 513; Dayton v. Moore, 30 N. J. Eq. 543; Daley v. Investment Co., 43 Minn. 517, 45 N. W. 1100; Swan-

a cover for a usurious transaction.⁷⁷ It has been held that it is usury to delay payment of the money loaned, and exact interest for the full time.⁷⁸

If a contract reserves excessive interest merely because of a mistaken calculation, it is not for that reason usurious. There must be an intention to charge and to pay the illegal rate.⁷⁹

A note given for a balance due on previous notes which were usurious, or in renewal of usurious notes, is itself tainted with usury,⁸⁰

strom v. Balstad, 51 Minn. 276, 53 N. W. 648; Iowa Savings & Loan Ass'n v. Heidt, 107 Iowa, 356, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. Rep. 197. But see Jackson v. May, 28 Ill. App. 305. But if the lender exacts a bonus in addition to interest at legal rate, it is usury. Fanning v. Dunham, 5 Johns. Ch. (N. Y.) 122; Hewitt v. Dement, 57 Ill. 500; Walter v. Foutz, 52 Md. 147; Harris v. Wicks, 28 Wis. 198; Stark v. Sperry, 6 Lea (Tenn.) 411, 40 Am. Rep. 47; Rowland v. Bull, 5 B. Mon. (Ky.) 146. But exacting bonus or commission by agent as condition of making loan at legal interest for his principal, without knowledge or consent of the latter, does not constitute usury in the principal. Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; New England Mortgage Security Co. v. Townes (Miss.) 1 South. 242; Acheson v. Chase, 28 Minn. 211, 9 N. W. 734; Ballinger v. Bourland, 87 Ill. 513, 29 Am. Rep. 69; Boyiston v. Bain, 90 Ill. 283; Williams v. Bryan, 68 Tex. 593, 5 S. W. 401; Lane v. Insurance Co., 46 N. J. Eq. 316, 19 Atl. 617, 618; May v. Flint, 54 Ark. 573, 16 S. W. 575; Boardman v. Taylor, 66 Ga. 638; Ammerman v. Ross, 84 Iowa, 359, 51 N. W. 6; Dryfus v. Burnes (C. C.) 53 Fed. 410. Not even where agent is general agent of lender to loan money, if illegal exaction is solely for agent's benefit, and without knowledge or sanction of lender, and he in no way ratifies it. Stein v. Swensen, 44 Minn. 218, 46 N. W. 360. But see Kemmitt v. Adamson, 44 Minn. 121, 46 N. W. 327. If the principal knows of exaction, contract is usurious. Banks v. Flint, 54 Ark. 40, 14 S. W. 769, 16 S. W. 477, 10 L. R. A. 459; Bliven v. Lydecker, 130 N. Y. 102, 28 N. E. 625; Payne v. Newcomb, 100 Ill. 611, 39 Am. Rep. 69. Payment to attorney for examining title. Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47. Bonus paid by borrower to his own agent for procuring loan is no part of sum paid for loan. Dryfus v. Burnes (C. C.) 53 Fed. 410; Goodwin v. Bishop, 145 Ill. 421, 34 N. E. 47; Grieser v. Hall, 56 Minn. 155, 57 N. W. 462. But see, contra, where lender knew of payment. Brown v. Brown, 38 S. C. 173, 17 S. E. 452. And see Holt v. Kirby, 57 Ark. 251, 21 S. W. 432.

⁷⁷ Sherwood v. Roundtree (C. C.) 32 Fed. 113; Pfenning v. Scholer, 43 N. J. Eq. 13, 10 Atl. 833; Sanford v. Kane, 133 Ill. 199, 24 N. E. 414.

⁷⁸ Barr's Adm'x v. African M. E. Church (N. J. Eq.) 10 Atl. 287. Cf. Daley v. Investment Co., 43 Minn. 517, 45 N. W. 1100; Rose v. Munford, 36 Neb. 148, 54 N. W. 129.

⁷⁹ Tyson v. Rickard, 3 Har. & J. (Md.) 109, 5 Am. Dec. 424; Bevier v. Covell, 87 N. Y. 50; Gibson v. Stearns, 3 N. H. 185; Smythe v. Allen, 67 Miss. 146, 6 South. 627; Bearce v. Barstow, 9 Mass. 45, 6 Am. Dec. 25; Brown v. Bank, 86 Iowa, 527, 53 N. W. 410; Lloyd v. Scott, 4 Pet. 205, 7 L. Ed. 833; Price v. Campbell, 2 Call (Va.) 110, 1 Am. Dec. 535; McFarland v. Bank, 4 Ark. 44, 37 Am. Dec. 761; Henry v. Sansom, 2 Tex. Civ. App. 150, 21 S. W. 69; McElfratrick v. Hicks, 21 Pa. 402.

⁸⁰ Cottrell v. Southwick, 71 Iowa, 50, 32 N. W. 22; Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567; McDonald v. Aufdengarten, 41 Neb. 40, 59 N. W. 762; Levey v. Allen, 72 Hun, 321, 25 N. Y. Supp. 352. If, however, a usurious

but a note given to a third party for money to be applied in payment of other notes which were usurious is not itself usurious.⁸¹

Wagers and Gambling Transactions.

A "wager" has been defined as a contract conditional upon an event in which the parties have no interest except that which they create by the wager; ⁸² but this attempts to limit the term to contracts not permitted by law, and is not broad enough. Parties may make a wager on a matter in which they are interested. It is more accurate to say that a wager is a promise to pay money or transfer property upon the determination or ascertainment of an uncertain event or fact, the consideration for the promise being either a present payment or transfer by the other party, or a promise to do so upon the event or fact being determined or ascertained in a particular way.⁸³ The term is often applied to contracts not permitted by law, as opposed to others which, though precisely similar in their nature, may be enforced, and this has resulted in some confusion.

A wager may be what we understand by a "bet,"—that is, a purely gambling transaction,—or it may be directed to commercial objects. A man who bets on the result of a horse race makes a wagering contract; but so does a man who takes out a policy of insurance, for he

contract is mutually abandoned by the parties, and the securities canceled or destroyed, so that they may not become the foundation of an action, and the borrower then makes a contract to pay the amount actually received by him, this last contract will not be tainted with the original usury. *Sheldon v. Haxtun*, 91 N. Y. 125; *Levey v. Allien*, supra; *Porter v. Jefferies*, 40 S. C. 92, 18 S. E. 229.

⁸¹ *Cottrell v. Southwick*, 71 Iowa, 50, 32 N. W. 22; *Vaught v. Rider*, 83 Va. 659, 3 S. E. 293, 5 Am. St. Rep. 305; *France v. Smith*, 87 Iowa, 552, 54 N. W. 366. Contra, where the transaction is a mere cover for a usurious loan. *Luckens v. Hazlett*, 37 Minn. 441, 35 N. W. 265.

⁸² *Leake*, Cont. 377. By the terms of a note, given in part payment of land, defendant promised to pay \$900 if cotton should rise to 8 cents by a certain date, and, if not, to pay \$500. It was held that the agreement was not a wager on the price of cotton, "for the parties had an interest in the contingency. The defendant purchased the land at the lowest price, unconditionally, but contracted to pay a larger sum if the value should be enhanced by the increased value of its product." *FERGUSON v. COLEMAN*, 3 Rich. Law (S. C.) 99, 45 Am. Dec. 761. A contract by which a party purchases 50 bushels of "Bohemian oats" at \$10 a bushel, and the seller agrees to sell for him the next year 100 bushels at \$10 a bushel, has been held not to be a gambling contract. *Shipley v. Reasoner*, 80 Iowa, 548, 45 N. W. 1077; *Matson v. Blossom*, 50 Hun, 600, 2 N. Y. Supp. 551. Contra, *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281. Such contracts, however, are illegal, since they cannot be performed without defrauding some one. *Hanks v. Brown*, 79 Iowa, 560, 44 N. W. 811; *Merrill v. Packer*, 80 Iowa, 542, 45 N. W. 1076. Contra, *Matson v. Blossom*, supra. For similar contract, illegal because tending to defraud, see *Hubbard v. Freiburger* (Mich.) 94 N. W. 727.

⁸³ *Anson*, Cont. (4th Ed.) 173; *HAMPDEN v. WALSH*, 1 Q. B. Div. 189.

bets on the safety of the property insured, or on the duration of the life, as the case may be. In the latter case the contract may be valid, but it is nevertheless a wager.⁸⁴

At common law in England, over a century ago, wagers on almost all subjects were enforceable. Gradually the courts, finding that frivolous and indecent matters were sometimes brought before them for decision, established a rule that a wager would not be enforced if it led to indecent evidence, or was calculated to injure or pain a third person, and in some cases general notions of public policy were introduced to the effect that any wager which tempted a man to offend against the law was illegal.⁸⁵

Aside from these cases, wagers continued to be enforced in England, and have been enforced in many of our states.⁸⁶ In other states, the courts have held all wagering contracts on matters in which the parties have no interest illegal, as being contrary to public policy.⁸⁷

⁸⁴ Anson, Cont. (4th Ed.) 174-176.

⁸⁵ See *Gilbert v. Sykes*, 16 East, 150; *Hartley v. Rice*, 10 East, 22; *Good v. Elliott*, 3 Term R. 693; *Eltham v. Kingsman*, 1 Barn. & Ald. 683; *Atherford v. Beard*, 2 Term. R. 610; *Evans v. Jones*, 5 Mees. & W. 77; *Ditchburn v. Goldsmith*, 4 Camp. 152. And see *Brogden v. Marriott*, 3 Bing. N. C. 88; *Ramholl v. Soojumnul*, 6 Moore, P. C. 310; *Bunn v. Riker*, 4 Johns. (N. Y.) 426, 4 Am. Dec. 292; *Rust v. Gott*, 9 Cow. (N. Y.) 169, 18 Am. Dec. 497; *Hill v. Kidd*, 43 Cal. 615; *Vischer v. Yates*, 11 Johns. (N. Y.) 21.

⁸⁶ *Campbell v. Richardson*, 10 Johns. (N. Y.) 406; *Good v. Elliott*, 3 Term R. 693; *Clendinning v. Church*, 3 Caines (N. Y.) 141; *WINCHESTER v. NUTTER*, 52 N. H. 507, 13 Am. Rep. 93; *Deweese v. Miller*, 5 Har. (Del.) 347; *Stoddard v. Martin*, 1 R. I. 1, 19 Am. Dec. 643; *Buchanan v. Insurance Co.*, 6 Cow. (N. Y.) 318; *Wheeler v. Spencer*, 15 Conn. 28; *Johnston v. Russell*, 37 Cal. 670; *Wroth v. Johnson*, 4 Har. & McH. (Md.) 284; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646; *Trenton Mut. Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576; *Wootan v. Hasket*, 1 Nott & McC. (S. C.) 180; *Kirkland v. Randon*, 8 Tex. 10, 58 Am. Dec. 94. Wager as to shape of earth. *HAMPDEN v. WALSH*, 1 Q. B. Div. 189; as to weight of hog, *Mulford v. Bowen*, 9 N. J. Law, 315; as to result of past election in another state, *Smith v. Smith*, 21 Ill. 244, 74 Am. Dec. 100; as to time within which railroad would be completed, *Beadles v. Bless*, 27 Ill. 320, 81 Am. Dec. 231; *Johnson v. Fall*, 6 Cal. 339, 65 Am. Dec. 518.

⁸⁷ *HARVEY v. MERRILL*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Amory v. Gilman*, 2 Mass. 1; *LOVE v. HARVEY*, 114 Mass. 80; *Perkins v. Eaton*, 3 N. H. 152; *West v. Holmes*, 26 Vt. 530; *WINCHESTER v. NUTTER*, 52 N. H. 507, 13 Am. Rep. 93; *Wheeler v. Spencer*, 15 Conn. 28; *Lewis v. Littlefield*, 15 Me. 233; *Stoddard v. Martin*, 1 R. I. 1, 19 Am. Dec. 643; *Collamer v. Day*, 2 Vt. 144; *Edgell v. McLaughlin*, 6 Whart. (Pa.) 176, 36 Am. Dec. 214; *Thomas v. Cronise*, 16 Ohio, 54; *Lucas v. Harper*, 24 Ohio St. 328; *BERNARD v. TAYLOR*, 23 Or. 416, 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693; *Rice v. Gist*, 1 Strob. (S. C.) 82; *Wilkinson v. Tousley*, 16 Minn. 299 (Gil. 263), 10 Am. Rep. 139; *Eldred v. Malloy*, 2 Colo. 320, 20 Am. Rep. 752; *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275.

There are now, both in England⁸⁸ and in this country, statutes covering the subject. There is so much difference in the statutes of the different states that it would be impracticable to attempt to give them. It is sufficient to say that in almost all the states, if not in all, the statutes make all gambling contracts either void, or both illegal and void.

Same—Offer of Premium or Reward.

Neither under the common law nor under the statutes against gaming, betting, and wagers is the bona fide offer of premiums or purses on horse races or other legitimate competitions illegal, and it is immaterial that the competitors are required to pay an entrance fee before they are allowed to compete, and that these fees go to make up in part the premium or purse offered.⁸⁹

Same—Contracts of Insurance.

At common law, in England, contracts of insurance, like other wagers, were valid though the assured had no interest whatever in the property or the life insured;⁹⁰ and the English doctrine, as we have seen, has been recognized in a few of our states.⁹¹ Probably in most of our states, however, the doctrine has been repudiated, and it has been held, independently of any statute, that contracts of insurance with a person who has no interest in the property or life are mere gambling transactions, and are void.⁹² The subject is now very generally dealt with by statute both in England and with us, so that there is seldom any occasion to look to the common law. By these statutes, any contract of marine, fire, or life insurance is declared void unless the assured has an insurable interest.

⁸⁸ Anson, Cont. (8th Ed.) 189 et seq. Some of the earlier English statutes have in this country been regarded as part of the common law. Emerson v. Townsend, 73 Md. 224, 20 Atl. 984.

⁸⁹ Porter v. Day, 71 Wis. 296, 37 N. W. 259. And see Harris v. White, 81 N. Y. 532; Misner v. Knapp, 13 Or. 135, 9 Pac. 65, 57 Am. Rep. 6; Delier v. Society, 57 Iowa, 481, 10 N. W. 872; Alvord v. Smith, 63 Ind. 58; People v. Fallon, 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492; Hankins v. Ottinger, 115 Cal. 454, 47 Pac. 254, 40 L. R. A. 76; Wilkinson v. Stitt, 175 Mass. 581, 56 N. E. 830. In some states the offer of such rewards or premiums is prohibited in certain cases. Bronson Agricultural & B. Ass'n v. Ramsdell, 24 Mich. 441. It is otherwise where the offer of a premium is a mere subterfuge to cover a bet; as where the owners of horses make up a purse, and put it in the hands of a third person to pay to the one of them whose horse shall win. Gibbons v. Gouverneur, 1 Denio (N. Y.) 170.

⁹⁰ Kulen Kemp v. Vigne, 1 Term R. 304; Dean v. Dicker, 2 Strange, 1250.

⁹¹ Clendinning v. Church, 3 Caines (N. Y.) 141; Buchanan v. Insurance Co. 6 Cow. (N. Y.) 318; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. Law, 576.

⁹² Stevens v. Warren, 101 Mass. 564; WARNOCK v. DAVIS, 104 U. S. 775, 26 L. Ed. 924; Amory v. Gilman, 2 Mass. 1; Loomis v. Insurance Co., 6 Gray (Mass.) 396; Bersch v. Insurance Co., 28 Ind. 64; Bevin v. Insurance Co., 23 Conn. 244; Sawyer v. Mayhew, 51 Me. 398; Sweeney v. Insurance Co., 20 Pa. 337; Fowler v. Insurance Co., 26 N. Y. 422; ante, p. 276.

The question as to what amounts to an insurable interest is one more peculiarly for a work on insurance, and it would be impracticable for us to go into it. In the case of marine or fire insurance it is sufficient to say that if a person has any interest in the vessel, cargo, or other property, legal or equitable, so that he would suffer a loss if it should be destroyed, he has an insurable interest.⁹³ In the case of life insurance it has been said that "all which it seems necessary to show in order to take the policy out of the objection of being a wager policy is that the insured has some interest in the life of the *cestui que vie*; that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages supposed to depend on the life of another."⁹⁴

Same—Futures.

An agreement for the sale of stocks, grain, or any other commodity is a gambling contract where the parties do not intend an actual delivery, but agree that at the time fixed for delivery, they shall settle by one of them paying the other the difference between the price agreed upon and the market price at the time of delivery. This is a mere bet or speculation on the rise and fall of the price of the article, and is illegal, not only under the statutes, but in most states even independently of any statute.⁹⁵ The law on this subject was thus stated in a

⁹³ 1 Bid. Ins. § 155 et seq.

⁹⁴ *Loomis v. Insurance Co.*, 6 Gray (Mass.) 398; 1 Bid. Ins. § 186 et seq.

⁹⁵ *HARVEY v. MERRILL*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Burt v. Meyer*, 71 Md. 467, 18 Atl. 796; *Brua's Appeal*, 55 Pa. 294; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; *Everingham v. Meighan*, 55 Wis. 354, 13 N. W. 269; *White v. Barber*, 123 U. S. 392, 8 Sup. Ct. 221, 31 L. Ed. 243; *Hatch v. Douglass*, 48 Conn. 116, 40 Am. Rep. 154; *Dunn v. Bell*, 85 Tenn. 581, 4 S. W. 41; *Pickering v. Cease*, 79 Ill. 328; *Flagg v. Gilpin*, 17 R. I. 10, 19 Atl. 1084; *Lawton v. Blitch*, 83 Ga. 663, 10 S. E. 353; *Lester v. Buel*, 49 Ohio St. 240, 30 N. E. 821, 34 Am. St. Rep. 556; *MOHR v. MIESEN*, 47 Minn. 228, 49 N. W. 862; *Wagner v. Hildebrand*, 187 Pa. 136, 41 Atl. 34; *Johnston v. Miller*, 67 Ark. 172, 53 S. W. 1052; *Counselman v. Reichart*, 103 Iowa, 430, 72 N. W. 490; *Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302; *Ponder v. Jerome Hill Cotton Co.*, 100 Fed. 373, 40 C. C. A. 416; *Clews v. Jamieson*, 96 Fed. 648, 38 C. C. A. 473; *Morris v. Western Union Telegraph Co.*, 94 Me. 423, 47 Atl. 926; *Atwater v. Manville*, 106 Wis. 64, 81 N. W. 985; *Rogers v. Marriott*, 59 Neb. 759, 82 N. W. 21. And see cases cited in notes 345, 347, *infra*. Such transactions are not regarded as contrary to public policy in England, but are held to be gaming and wagering transactions within the meaning of the statute prohibiting such transactions. *THACKER v. HARDY*, 4 Q. B. Div. 685. It has been held, however, that this class of contracts were not gaming contracts within the meaning of statutes avoiding instruments in the hands of *bona fide*

late Massachusetts case: "If, in a formal contract for the purchase and sale of merchandise to be delivered in the future at a fixed price, it is actually the agreement of the parties that the merchandise shall not be delivered and the price paid, but that, when the stipulated time for performance arrives, a settlement shall be made by a payment in money of the difference between the contract price and the market price of the merchandise at that time, this agreement makes the contract a wagering contract. If, however, it is agreed by the parties that the contract shall be performed according to its terms if either party requires it, and that either party shall have a right to require it, the contract does not become a wagering contract because one or both of the parties intend, when the time for performance arrives, not to require performance, but to substitute therefor a settlement by the payment of the difference between the contract price and the market price at that time. Such an intention is immaterial, except so far as it is made a part of the contract, although it need not be made expressly a part of the contract. To constitute a wagering contract, it is sufficient, whatever may be the form of the contract, that both parties understand and intend that one party shall not be bound to deliver the merchandise and the other to receive it and to pay the price, but that a settlement shall be made by the payment of the difference in prices."⁹⁶

This intention must be common to both parties. If one of them intends a bona fide sale, and actual delivery if it shall be required, he may enforce the contract, though the other party may have intended a wager on future prices.⁹⁷ The fact that the seller has not the article

holders if given on a gaming consideration. *Shaw v. Clark*, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474; *Third Nat. Bank v. Harrison* (C. C.) 10 Fed. 243. But see, contra, *THACKER v. HARDY*, 4 Q. B. Div. 685; *Cunningham v. Bank*, 71 Ga. 400, 51 Am. Rep. 266; *Grizewood v. Blane*, 11 C. B. 526; *Lyons v. Hodgen*, 90 Ky. 280, 13 S. W. 1076. That they are wagers within the meaning of a statute, see *McGrew v. Produce Exchange*, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771.

⁹⁶ *HARVEY v. MERRILL*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159. And see *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403. But if the circumstances show that the transaction was a speculation only, and that no delivery was intended, it is void, notwithstanding a rule of the exchange that actual delivery may be exacted. *Beadles v. McElrath*, 85 Ky. 230, 3 S. W. 152.

⁹⁷ *PIXLEY v. BOYNTON*, 79 Ill. 351; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Bangs v. Hornick* (C. C.) 30 Fed. 97; *Jones v. Shale*, 34 Mo. App. 302; *Seanton v. Warren*, 169 Ill. 142, 48 N. E. 410; *Donovan v. Daiber*, 124 Mich. 49, 82 N. W. 848. Otherwise by some statutes. *Harvey v. Doty*, 54 S. C. 382, 32 S. E. 501. So of the contract between broker and principal. If the broker is privy to the unlawful intention of the parties, his contract with his principal is illegal, and he cannot recover his commissions, etc.; but if he is not privy thereto, his contract is legal. *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Bibb v. Allen*, 149 U. S. 498, 13 Sup. Ct. 950, 37 L. Ed. 819; *HARVEY v. MERRILL*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A.

sold at the time of the contract does not render the contract void. It is valid if an actual delivery is intended, though he is to buy the article in the market at the time of delivery, and though a margin may have been deposited as security.⁹⁸

Lotteries.

In England, and in most, if not all, of our states, lotteries are prohibited by statute. In Webster's Dictionary a "lottery" is defined to be "the distribution of prizes by lot or chance," and this definition has been expressly approved by some of the courts.⁹⁹ In an English case the proprietor of a journal had advertised a "missing word competition," the scheme of which was that persons should guess upon the word omitted in a published paragraph, accompanying their guess by a fee, the money so received to be distributed among the successful competitors. The proprietor, after receiving the money, refused to distribute it, and suit was brought against him by a successful competitor. It was held that the transaction was a lottery, as the distribution was to take place by chance, and that the action could not be maintained.¹⁰⁰

200, 15 Am. St. Rep. 159; Barnes v. Smith, 159 Mass. 344, 34 N. E. 403; MOHR v. MIESEN, 47 Minn. 228, 49 N. W. 862.

⁹⁸ Story v. Solomon, 71 N. Y. 420; Appleman v. Fisher, 34 Md. 540; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Gregory v. Wattowa, 58 Iowa, 711, 12 N. W. 726; Cole v. Milmine, 88 Ill. 349; Wall v. Schneider, 59 Wis. 352, 18 N. W. 443, 48 Am. Rep. 520; Wolcott v. Heath, 78 Ill. 433; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 37 S. E. 485, 81 Am. St. Rep. 28. Parol evidence is always admissible to show what was the real intention. Clarke v. Foss, 7 Biss. 540, Fed. Cas. No. 2852; Watte v. Wickersham, 27 Neb. 457, 43 N. W. 259; Gaw v. Bennett, 153 Pa. 247, 25 Atl. 1114, 34 Am. St. Rep. 699; Hentz v. Jewell (C. C.) 20 Fed. 592.

⁹⁹ BARCLAY v. PEARSON [1893] 2 Ch. 154; Taylor v. Smetten, 11 Q. B. Div. 210.

¹⁰⁰ BARCLAY v. PEARSON [1893] 2 Ch. 154. And see, as to what constitutes a lottery, Jackson Steel Nail Co. v. Marks, 4 Ohio Civ. Ct. R. 343; Caminada v. Hulton, 64 Law T. 572; gift enterprises, State v. Boneil, 42 La. Ann. 1110, 8 South. 298, 10 L. R. A. 60, 21 Am. St. Rep. 413; Long v. State, 73 Md. 527, 21 Atl. 683, 12 L. R. A. 89, 25 Am. St. Rep. 606; Id., 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; merchant tailor clubs, State v. Moren, 48 Minn. 555, 51 N. W. 618; prizes to stimulate trade, Davenport v. City of Ottawa, 54 Kan. 711, 39 Pac. 708, 45 Am. St. Rep. 303; Lynch v. Rosenthal, 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835, 55 Am. St. Rep. 168; State v. Investment Co., 64 Ohio St. 283, 60 N. E. 220, 52 L. R. A. 530, 83 Am. St. Rep. 754. A law prohibiting the giving of trading stamps held violative of liberty guaranteed by constitution, since transaction prohibited not a lottery. State v. Dalton, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818. See, also, Ex parte McKenna, 126 Cal. 429, 58 Pac. 916.

A distribution, however, does not constitute a lottery where no consideration is paid, directly or indirectly, for the right to participate.¹⁰¹

AGREEMENTS CONTRARY TO PUBLIC POLICY.

154. Any agreement which is contrary to the policy of the law, or public policy, because of its mischievous nature or tendency, is illegal and void, though the acts contemplated may not be expressly prohibited either by the common law or by statute.
155. The test of public policy must be applied in each case as it arises, and therefore agreements which have been or may be declared contrary to public policy cannot be exactly classified. The most general are:
 - (a) Agreements tending to injure the public service.
 - (b) Agreements involving or tending to the corruption of private citizens with reference to public matters.
 - (c) Agreements tending to pervert or obstruct public justice.
 - (d) Agreements tending to encourage litigation.
 - (e) Agreements of immoral tendency.
 - (f) Gambling transactions.
 - (g) Agreements tending to induce fraud and breach of trust.
 - (h) Agreements affecting the freedom or security of marriage, or otherwise in derogation of the marriage relation.
 - (i) Agreements in derogation of the parental relation.
 - (j) Agreements in unreasonable restraint of trade, including combinations to prevent competition, control prices, and create monopolies.
 - (k) Agreements exempting a person or corporation from liability for negligence.

There are many things which the law does not prohibit in the sense of attaching penalties, but which are so mischievous in their nature and tendency that, on grounds of public policy, they cannot be admitted as the subject of a valid contract. It is clearly to the interest of the public, however, that persons should not be unnecessarily restricted in their freedom to make their own contracts. "You have this paramount public policy to consider: that you are not lightly to interfere with the freedom of contract."¹⁰² The interests of the public, however, do require that there shall be some restrictions on the freedom of persons to enter into contracts. "The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public."¹⁰³

¹⁰¹ *Yellowstone Kit v. State*, 88 Ala. 196, 7 South. 338, 7 L. R. A. 599, 16 Am. St. Rep. 38; *Cross v. People*, 18 Colo. 321, 32 Pac. 821, 36 Am. St. Rep. 292.

¹⁰² *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462, per Jessel, M. R.

¹⁰³ *West Virginia Transp. Co. v. Pipe-Line Co.*, 22 W. Va. 600, 46 Am. Rep. 527.

SAME—AGREEMENTS TENDING TO INJURE THE PUBLIC SERVICE.

156. Among the agreements which are illegal as tending to injure the public service may be mentioned—

- (a) **Agreements for the sale of, or other traffic in, a public office, or its emoluments.**
- (b) **Agreements by public officers for greater pay than is fixed by law for performance of official duty; or for less pay where the services are yet to be performed.**
- (c) **Assignment of his future salary, and, under some circumstances, of his pension, by a public officer.**
- (d) **Agreements to influence legislation by personal solicitation of the legislators, or other objectionable means.**
- (e) **Agreements to procure administrative action by public officers by corrupt means. Some, but not all, courts hold that any agreement by a third person, for a compensation, to procure such action, is illegal, because of its tendency to introduce corrupt means.**
- (f) **Agreements by public or quasi public corporations which interfere with their performance of the duties which they owe to the public.**

As the public has an interest in the proper performance of their duty by public officers, and would be prejudiced by agreements tending to impair an officer's efficiency, or otherwise interfere with the due execution of the duties of the office, such agreements are contrary to public policy and void.

Traffic in Public Offices.

As stated by Greenhood,¹⁰⁴ therefore, "any contract to appoint one to public office,¹⁰⁵ or involving the sale of a public¹⁰⁶ or quasi public¹⁰⁷ office, or to do anything in consideration of the promisee ex-

¹⁰⁴ Greenh. Pub. Pol. rule 287, p. 338.

¹⁰⁵ Robertson v. Robinson, 65 Ala. 610, 39 Am. Rep. 17; Hager v. Catlin, 18 Hun (N. Y.) 418; Stout v. Ennis, 28 Kan. 706. A contract by an officer, after election, to employ a person as his deputy may be valid. Stout v. Ennis, *supra*.

¹⁰⁶ Hall v. Gavitt, 18 Ind. 390; Card v. Hope, 2 Barn. & C. 661; Proprietors of Cardigan v. Page, 6 N. H. 183; Town of Meredith v. Ladd, 2 N. H. 517; Love v. Buckner, 4 Bibb (Ky.) 506; Groton v. Inhabitants of Waldoborough, 11 Me. 306; 26 Am. Dec. 530; Martin v. Royster, 8 Ark. 74; Outon v. Rodes, 3 A. K. Marsh. (Ky.) 432, 13 Am. Dec. 193; Engle v. Chipman, 51 Mich. 524, 16 N. W. 886; Alvord v. Collin, 20 Pick. (Mass.) at page 428. The legislature may provide for sale of an office. Town of Thetford v. Hubbard, 22 Vt. 440.

¹⁰⁷ Blatchford v. Preston, 8 Term R. 89; Card v. Hope, 2 Barn. & C. 661.

changing office with,¹⁰⁸ or securing an office for¹⁰⁹ the promisor, or recommending him for such office,¹¹⁰ or resigning any office,¹¹¹ is void."

As tending to injure the public service may also be mentioned agreements by which a person not occupying a public office secures to himself all or any part of its benefits or emoluments.¹¹² Other agreements to which this principle applies are agreements by a public officer to pay another for performing the duties of his office for him, for an officer has no authority to delegate his duties to another;¹¹³ but this does not apply where an officer merely employs a deputy or other private person to assist him.¹¹⁴

Agreements Affecting the Compensation of Public Officers.

As we have seen, a promise to pay a public officer for performing duties which he is required by law to perform without such compensation, or to pay him more than the fees fixed by law, is void for want of consideration.¹¹⁵ Such contracts are also illegal as being contrary to public policy.¹¹⁶ "The rewards of officers," it has been

¹⁰⁸ Stroud v. Smith, 4 Houst. (Del.) 448.

¹⁰⁹ Gray v. Hook, 4 N. Y. 449; Law v. Law, 3 P. Wms. 391; MEGUIRE v. CORWINE, 101 U. S. 111, 25 L. Ed. 899; Nichols v. Mudgett, 32 Vt. 546; Martin v. Wade, 37 Cal. 168; Hunter v. Nolf, 71 Pa. 282; Morse v. Ryan, 26 Wis. 356; Harris v. Chamberlain, 126 Mich. 280, 85 N. W. 728.

¹¹⁰ Hartwell v. Hartwell, 4 Ves. 811; Edwards v. Randle, 63 Ark. 318, 38 S. W. 343, 36 L. R. A. 174, 58 Am. St. Rep. 108.

¹¹¹ Eddy v. Capron, 4 R. I. 394, 67 Am. Dec. 541; Meacham v. Dow, 32 Vt. 721; Basket v. Moss, 115 N. C. 448, 20 S. E. 733, 48 L. R. A. 842, 44 Am. St. Rep. 463. And see Forbes v. McDonald, 54 Cal. 98.

¹¹² Greenh. Pub. Pol. rule 293, p. 349. An agreement by which one party stipulates to pay the other a proportion of the fees and emoluments of a public office which he is seeking, in consideration that that other will aid him in obtaining it, is void. Gray v. Hook, supra. And see Deyoe v. Woodworth, 144 N. Y. 448, 39 N. E. 375.

¹¹³ Engle v. Chipman, 51 Mich. 524, 16 N. W. 886; Schloss v. Hewlett, 81 Ala. 266, 1 South. 263.

¹¹⁴ Price v. Caperton, 1 Duv. (Ky.) 297.

¹¹⁵ Ante, p. 127.

¹¹⁶ Weaver v. Whitney, 1 Hopk. Ch. (N. Y.) 13; Preston v. Bacon, 4 Conn. 471; Neustadt v. Hall, 58 Ill. 172; Trundle's Adm'r v. Riley, 17 B. Mon. (Ky.) 396; GILMORE v. LEWIS, 12 Ohio, 281; Brown v. Bank, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; Adams Co. v. Hunter, 78 Iowa, 328, 43 N. W. 208, 6 L. R. A. 615; Foley v. Platt, 105 Mich. 635, 63 N. W. 520; ante, p. 127, and cases there cited. Bond of indemnity given a sheriff to induce him to do what he was required to do without it. Mitchell v. Vance, 5 T. B. Mon. (Ky.) 528, 17 Am. Dec. 96. Bond indemnifying officer against loss for omitting to execute process. Harrington's Adm'r v. Crawford, 136 Mo. 467, 38 S. W. 80, 35 L. R. A. 477, 58 Am. St. Rep. 653. A public officer is not entitled to reward offered for the arrest which it was his duty to make without pay. SMITH v. WHILDIN, 10 Pa. 39, 49 Am. Dec. 572; GILMORE v. LEWIS, 12 Ohio, 281; POOL v. CITY OF BOSTON, 5 Cush. (Mass.) 219;

said, "are established by law. Their services are to be performed for those legal rewards; and other private rewards for acts which are required from them * * * must be regarded as corrupt and illegal exactions."¹¹⁷ The rule does not apply so as to prevent an officer from recovering on a promise to pay him for doing more than he is required by law to do.¹¹⁸

It has also been held that an agreement by a public officer, before performance of services, to accept less than the fees fixed by law, is against public policy.¹¹⁹

Assignment of Salary or Pension by Officer.

The rule also applies to the assignment of their salaries by public officers. One of the reasons given by an English judge was that "it is fit that the public servants should retain the means of a decent subsistence, without being exposed to the temptations of poverty."¹²⁰ It is not regarded as contrary to public policy for an officer to assign his salary after it has become due, but an assignment of it before it is due is void. The reason is that an officer is not apt to be as efficient in the performance of his duties after he has assigned his unearned salary.¹²¹

So, also, the assignment of a pension may be illegal if it is not granted exclusively for past services. "Where the pension is granted, not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced

Stamper v. Temple, 6 Humph. (Tenn.) 113, 44 Am. Dec. 206; *Davies v. Burns*, 5 Allen (Mass.) 349.

¹¹⁷ *Weaver v. Whitney*, 1 Hopk. Ch. (N. Y.) 13.

¹¹⁸ *Trundle v. Riley*, 17 B. Mon. (Ky.) 396; *McCandless v. Steel Co.*, 152 Pa. 139, 25 Atl. 579; *Carroll v. Tyler*, 2 Har. & G. (Md.) 57. An officer may recover a reward offered for apprehension of a criminal, if it was no part of his duty to make the arrest. *Morrell v. Quarles*, 35 Ala. 514; *Evans v. Inhabitants of City of Trenton*, 24 N. J. Law, 764.

¹¹⁹ *Hawkeye Ins. Co. v. Brainard*, 72 Iowa, 130, 33 N. W. 603; *Edgerly v. Hale*, 71 N. H. 138, 51 Atl. 679 (sheriff's fee for service payable only if action successful). Contra, *Bloom v. Hazzard*, 104 Cal. 310, 37 Pac. 1037. Cf. *Peters v. City of Davenport*, 104 Iowa, 625, 74 N. W. 6.

¹²⁰ *Wells v. Foster*, 8 Mees. & W. 149.

¹²¹ *Bliss v. Lawrence*, 48 How. Prac. (N. Y.) 22; *Id.*, 58 N. Y. 442, 17 Am. Rep. 273; *Bangs v. Dunn*, 66 Cal. 72, 4 Pac. 963; *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478, 25 N. E. 855, 9 L. R. A. 706, 19 Am. St. Rep. 507; *Schloss v. Hewlett*, 81 Ala. 266, 1 South. 263; *State v. Williamson*, 118 Mo. 146, 23 S. W. 1054, 21 L. R. A. 827, 40 Am. St. Rep. 358; *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215; *National Bank of El Paso v. Pink*, 86 Tex. 303, 24 S. W. 256, 40 Am. St. Rep. 833; *Brckett v. Blake*, 7 Mete. (Mass.) 335; *First Nat. Bank v. State (Neb.)* 94 N. W. 633. Contra, *State Bank v. Hastings*, 15 Wis. 78. The rule applies to an assignment of his fees by an executor before they are ascertained and fixed as provided by statute. In *re Worthington*, 66 Hun, 633, 22 N. Y. Supp. 19; *Id.*, 141 N. Y. 9, 35 N. E. 929, 23 L. R. A. 97.

by the length of service which the party has already performed, it is against the policy of the law that it should be assignable." ¹²²

Lobbying Contracts.

What are known as "lobbying contracts" also fall within this class of illegal agreements. Any agreement to render services in procuring legislative action, either by congress or by a state legislature or by a municipal council, by personal solicitation of the legislators or other objectionable means, is contrary to the plainest principles of public policy, and is void. ¹²³ "A contract for lobby services," it is said in a New York case, "for personal influence, for mere importunities to members of the legislature or other official body, for bribery or corruption, or for seducing or influencing them by any other arguments, persuasions, or inducements than as directly and legitimately bear upon the merits of the pending application, is illegal, and against public policy, and void;" ¹²⁴ and it has been held that a promise to pay a contingent fee on the passage of a bill is void, because such a fee is "a direct and strong incentive to the exertion of not merely personal, but sinister, influence upon the legislature." ¹²⁵

¹²² *Wells v. Foster*, 8 Mees. & W. 149. And see *Bliss v. Lawrence*, 58 N. Y. 422, 17 Am. Rep. 273 (collecting the English cases). Act Cong. Feb. 28, 1883, c. 58, § 2, 22 Stat. 432 [U. S. Comp. St. 1901, p. 3278], makes void any "pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension." See *Loser v. Board*, 92 Mich. 633, 52 N. W. 956.

¹²³ *TRIST v. CHILD*, 21 Wall. 441, 22 L. Ed. 623; *Spalding v. Ewing*, 149 Pa. 375, 24 Atl. 219, 15 L. R. A. 727, 34 Am. St. Rep. 608; *Frost v. Belmont*, 6 Allen (Mass.) 152; *Rose v. Truax*, 21 Barb. (N. Y.) 361; *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677; *McBratney v. Chandler*, 22 Kan. 692, 31 Am. Rep. 213; *Cook v. Shipman*, 24 Ill. 614; *Houlton v. Dunn*, 60 Minn. 26, 61 N. W. 898, 30 L. R. A. 737, 51 Am. St. Rep. 493; *Colusa County v. Welch*, 122 Cal. 428, 55 Pac. 243; *Hayward v. Manufacturing Co.*, 85 Fed. 4, 29 C. C. A. 438. "It is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results. It furnishes a temptation to the plaintiff to resort to corrupt means or improper devices to influence legislative action. It tends to subject the legislature to influences destructive of its character, and fatal to public confidence in its action." *Mills v. Mills*, 40 N. Y. 543, 100 Am. Dec. 535. And see *Veazey v. Allen*, 173 N. Y. 359, 66 N. E. 103, 62 L. R. A. 362.

¹²⁴ *Brown v. Brown*, 34 Barb. 533. And see *Sweeney v. McLeod*, 15 Or. 330, 15 Pac. 275.

¹²⁵ *Wood v. McCann*, 6 Dana (Ky.) 366. And see *Marshall v. Railroad Co.*, 16 How. 314, 14 L. Ed. 953; *Coquillard's Adm'r v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Harris v. Roof's Ex'rs*, 10 Barb. (N. Y.) 489; *Weed v. Black*, 2 MacArthur (D. C.) 268; *Chippewa Valley & S. Ry. Co. v. Railway Co.*, 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601; *Critchfield v. Paving Co.*, 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347; *Richardson v. Scotts Bluff County*, 59 Neb. 400, 81 N. W. 309, 48 L. R. A. 294, 80 Am. St. Rep. 682. But see, contra, *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Workman v. Campbell*, 46 Mo. 305; *Burbridge v. Fackler*, 2 MacArthur (D. C.) 407; *Denison v. Craw-*

The rule, however, does not apply to an agreement, for purely professional services, such as the drafting of a petition to set forth a claim for presentment to the legislature, attending the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more objectionable.¹²⁶

Corruption of Public Officers.

"Any contract," says Greenhood,¹²⁷ "contemplating the use of secret influence with public officers,¹²⁸ or calculated to induce the use of such influence,¹²⁹ is void, especially when one of the parties is a public officer himself,¹³⁰ though he be but a representative of a foreign government, and his position be merely honorary."¹³¹ Under this rule any

ford Co., 48 Iowa. 211; *Bergen v. Frisbie*, 125 Cal. 168, 57 Pac. 784. The legislature may determine what public policy requires or permits in prosecuting claims of the state against the United States, and the manner of compensation. *Davis v. Com.*, 164 Mass. 241, 41 N. E. 292, 30 L. R. A. 743. See, also, *Opinion of Justices (N. H.)* 54 Atl. 950.

¹²⁶ *TRIST v. CHILD*, 21 Wall. 441, 22 L. Ed. 623; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Chesebrough v. Conover*, 140 N. Y. 382, 35 N. E. 633 (affirming 66 Hun. 634, 21 N. Y. Supp. 566); *Salinas v. Stillman*, 66 Fed. 677, 14 C. C. A. 50. And see *Houlton v. Nichol*, 93 Wis. 393, 67 N. W. 715, 33 L. R. A. 166, 57 Am. St. Rep. 928.

¹²⁷ *Greenh. Pub. Pol.* p. 357, rule 300.

¹²⁸ *Murray v. Wakefield*, 9 Mo. App. 591; *Hutchen v. Gibson*, 1 Bush (Ky.) 270. To use influence to procure session of legislature at a particular place. *Thorne v. Yontz*, 4 Cal. 321. To use influence, or agreement tending to encourage use of influence, with the prosecuting attorney in respect to criminal prosecutions. *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Wight v. Rindskopf*, 43 Wis. 344; *Willey v. Collier*, 7 Md. 273, 61 Am. Dec. 346; *Rhodes v. Neal*, 64 Ga. 704, 37 Am. Rep. 93; *Barron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684. Agreement for compensation to use influence to procure pardon of convict, or commutation of sentence. *Haines v. Lewis*, 54 Iowa, 391, 6 N. W. 495; *O'Reilly v. Cleary*, 8 Mo. App. 186; *Kribben v. Hayercraft*, 26 Mo. 396; *Hatzfield v. Gulden*, 7 Watts (Pa.) 152, 31 Am. Dec. 750; *Norman v. Cole*, 3 Esp. 253; *Deering & Co. v. Cunningham*, 63 Kan. 174, 65 Pac. 263, 54 L. R. A. 410. But see *Formby v. Pryor*, 15 Ga. 258; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Rau v. Boyle*, 5 Bush (Ky.) 253; *Timothy v. Wright*, 8 Gray (Mass.) 522; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329,—sustaining such an agreement where no corrupt means were to be resorted to.

¹²⁹ *TRIST v. CHILD*, 21 Wall. 441, 22 L. Ed. 623; *Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868; *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Bowman v. Coffroth*, 59 Pa. 19; *O'Hara v. Carpenter*, 23 Mich. 410, 9 Am. Rep. 89.

¹³⁰ *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Hovey v. Storer*, 63 Me. 486.

¹³¹ Note 134, *infra*.

agreement by which a person is to endeavor to procure a government contract for another by the use of corrupt means is illegal. Some courts hold that such an agreement, though a compensation is to be paid, is not illegal in itself, but becomes so only where corrupt means are to be resorted to.¹³² Other courts, however, have held that any such agreement, for a compensation, is illegal, because of its tendency to introduce corrupt means. "Considerations," it has been said by the supreme court of the United States, "as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. * * * Whatever tends to introduce any other elements into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."¹³³

It has also been held that a contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country, even though it may not be invalid according to the laws and customs of the foreign country. The courts will refuse to enforce such a contract, "not from any consideration of the interests of that government, or any regard for its policy, but from the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people."¹³⁴

As in the case of contracts to render services in procuring the passage of acts and ordinances, so also in the case of contracts to render services in procuring administrative action by government officials, the services contracted for may be legitimate. If the contract does not tend to induce the use of corrupt means, and in some jurisdictions, as we have seen, if corrupt means are not to be resorted to, the contract is valid.¹³⁵

¹³² *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *SOUTHARD v. BOYD*, 51 N. Y. 177; *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. 532; *Winnepenny v. French*, 18 Ohio St. 469; *Barry v. Capen*, 151 Mass. 99, 23 N. E. 735, 6 L. R. A. 808; *Formby v. Pryor*, 15 Ga. 258; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329.

¹³³ *Tool Co. v. Norris*, 2 Wall. 45, 17 L. Ed. 868; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746; *MEGUIRE v. CORWINE*, 101 U. S. 108, 25 L. Ed. 899; *Devlin v. Brady*, 36 N. Y. 531; *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69; *Caton v. Stewart*, 76 N. C. 357; *Critchfield v. Paving Co.*, 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347.

¹³⁴ *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539.

¹³⁵ *Sedgwick v. Stanton*, 14 N. Y. 289; *Burlbridge v. Fackler*, 2 MacArthur (D. C.) 407; *Painter v. Drum*, 40 Pa. 467, ante, p. 286. Contract to procure

Agreements by Public or Quasi Public Corporations.

As falling within this class of illegal contracts may also be mentioned agreements by public or quasi public corporations which interfere with their duties to the public.¹³⁶ Railroad companies and other common carriers, for instance, are regarded to some extent as public servants, and it is contrary to public policy for them to make any agreement whereby they may be hindered in serving the public. For this reason most courts have refused to uphold subscriptions or other contracts with railroad companies, under which they bind themselves to build their road along a particular route, or to locate their station or depot at a particular point or not at a particular point.¹³⁷ Some courts, however, sustain such a contract where the company is not restricted from locating lines, stations, or depots along other routes or at other points also, or otherwise doing whatever the public convenience may require.¹³⁸

So, also, any other agreement by a railroad company or other corporation chartered as a common carrier, or for other quasi public purposes, as in the case of water or gas companies, by which it prevents itself from performing the duties which it owes to the public, is void.¹³⁹

by legitimate means a pardon, commutation of sentence, etc., in a proper case. Note 128, *supra*.

¹³⁶ "Any contract which will disable a public or quasi public corporation from performing the duty which it has undertaken, or which has been imposed upon it, for the public weal, or compels it to make the public accommodation or convenience subservient to its private interests, is void." Greenh. Pub. Pol. rule 269; *Chicago Gas-Light & Coke Co. v. Coke Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *Doane v. Railway Co.*, 160 Ill. 22, 45 N. E. 597, 35 L. R. A. 588; *South Chicago City Ry. Co. v. Railway Co.*, 171 Ill. 391, 49 N. E. 576.

¹³⁷ *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *Holladay v. Patterson*, 5 Or. 182; *Bestor v. Wathen*, 60 Ill. 138; *WOODSTOCK IRON CO. v. EXTENSION CO.*, 129 U. S. 643, 9 Sup. Ct. 402, 32 L. Ed. 819; *Florida C. & P. R. Co. v. State*, 31 Fla. 482, 13 South. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30; *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592, 22 Am. Rep. 122; *Id.*, 104 Ill. 257; *Williamson v. Railroad Co.*, 53 Iowa, 126, 4 N. W. 870; *Burney's Heirs v. Ludeling*, 47 La. Ann. 73, 16 South. 507.

¹³⁸ *Louisville, N. A. & C. R. Co. v. Sumner*, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; *Swartwout v. Railroad Co.*, 24 Mich. 389; *First Nat. Bank v. Hendrie*, 49 Iowa, 402, 31 Am. Rep. 153; *Harris v. Roberts*, 12 Neb. 631, 12 N. W. 89, 41 Am. Rep. 779; *International & G. N. Ry. Co. v. Dawson*, 62 Tex. 260; *Texas & St. L. R. Co. v. Robards*, 60 Tex. 545, 48 Am. Rep. 268; *Telford v. Railroad Co.*, 172 Ill. 559, 50 N. E. 105; *Lyman v. Railroad Co.*, 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645.

¹³⁹ *Central Transp. Co. v. Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; *York & M. Line R. Co. v. Winans*, 17 How. 30, 15 L. Ed. 27; *Peoria & R. I. R. Co. v. Mining Co.*, 68 Ill. 489; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; *Peters v. Rylands*, 20 Pa. 497, 59 Am.

A combination, therefore, between two railroad companies owning competing lines, by which one line is to be discontinued or leased to the other, will not be sustained.¹⁴⁰ This principle, it has been said, does not apply to individuals engaged in the business of common carriers. The owner of one line of steamers, it has been held, may make a contract with an individual owner of a competing line, by which the latter is to discontinue his vessels.¹⁴¹

Under this head may also be mentioned contracts by which a common carrier or other quasi public corporation makes an undue discrimination in favor of a particular person. Such a contract is not only generally prohibited by statute, but is contrary to public policy independently of any statutory provision on the subject.¹⁴²

Agreements Affecting the Government, etc.

There are many agreements which, though not tending to injure the public service, injuriously affect the government itself in some other way, and which are therefore illegal, as contrary to public policy.¹⁴³ These agreements are collected by Greenh.¹⁴⁴ and may be shortly stated as follows: (1) Agreements contemplating the appropriation of public money for purposes not sanctioned by law.¹⁴⁵ (2) Agreements which seek to secure to strangers a gratuity which the public

Dec. 746; *State v. Railroad Co.*, 29 Conn. 538; *Denver & N. O. R. Co. v. Railroad Co.* (C. C.) 15 Fed. 650.

¹⁴⁰ *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950; Greenh. Pub. Pol. p. 318 (collecting cases); *Gulf, C. & S. F. Ry. Co. v. Morris*, 67 Tex. 692, 4 S. W. 156. This is expressly prohibited or regulated by statute in most states.

¹⁴¹ *Leslie v. Lorillard*, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456. But see *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670, 6 L. R. A. 390.

¹⁴² *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250, 8 N. E. 862, 59 Am. Rep. 369; *Scotfield v. Railroad Co.*, 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; *Chesapeake & P. Telephone Co. v. Telegraph Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167. It has been held, however, that there is nothing to prevent a quasi public corporation from granting exclusive privileges, as where a railroad company gives a telegraph company the exclusive privilege of operating a telegraph line along its road; but there is high authority to the contrary. *Western Union Telegraph Co. v. Railroad Co.*, 86 Ill. 246, 29 Am. Rep. 28; *Canadian Pac. R. Co. v. Telegraph Co.*, 17 Can. S. C. R. 151. Contra, *Western Union Telegraph Co. v. Telegraph Co.*, 65 Ga. 160, 38 Am. Rep. 781. Contract between railroad and ferry company. *Wiggins Ferry Co. v. Railroad Co.*, 73 Mo. 389, 39 Am. Rep. 519.

¹⁴³ *Fisher Electric Co. v. Iron Works*, 116 Mich. 293, 74 N. W. 493. "Contracts which take advantage of the depreciation of the national currency, or which contemplate speculation on such depreciation, are valid." Greenh. Pub. Pol. rule 305, p. 370. *Cox v. Smith*, 1 Nev. 161, 90 Am. Dec. 476. Agreements for the purchase and sale of gold: *Brown v. Speyers*, 20 Grat. (Va.) 296; *Cooke v. Davis*, 53 N. Y. 318; *Cameron v. Dürkheim*, 55 N. Y. 425; *Peabody v. Speyers*, 56 N. Y. 230.

¹⁴⁴ Greenh. Pub. Pol. rules 302-315.

¹⁴⁵ *Capehart v. Rankin*, 3 W. Va. 571, 100 Am. Dec. 779.

has offered for services rendered; as in the case of an agreement to secure to a stranger bounties offered by the government for military services.¹⁴⁶ (3) Agreements which seek to secure to a stranger the benefit of a privilege granted by the government to the promisor; as, for instance, where a person who has received from the government a license to trade with the Indians agrees for a consideration to share the profits with a stranger.¹⁴⁷ (4) Agreements with an alien enemy.¹⁴⁸

An agreement, the object or natural tendency of which is to diminish competition among the applicants or bidders for a public contract or for a public franchise, is illegal as against public policy.¹⁴⁹

SAME-AGREEMENTS PROMOTIVE OF NONOFFICIAL CORRUPTION.¹⁵⁰

157. The illegal agreements which may be classified under this head are:

- (a) **Agreements by a private citizen to violate a duty which he owes to the public.**
- (b) **Agreements tending to impair the integrity of public elections.**

Among the agreements which may be treated under the first head, and which are deemed contrary to public policy and illegal, are agreements in consideration of a person's forbearing to petition for the repeal of a public law,¹⁵¹ or to oppose on public grounds any measure or proceeding before a legislative body,¹⁵² agreements tending to suppress inquiry by the legislature into matters of public concern,¹⁵³ agreements in consideration of a person's opposing¹⁵⁴ or of his approv-

¹⁴⁶ *Decker v. Saltsman*, 1 Hun (N. Y.) 421.

¹⁴⁷ *Gould v. Kendall*, 15 Neb. 549, 19 N. W. 483.

¹⁴⁸ *Ante*, p. 146. See *Greenh. Pub. Pol. rules* 306-315. "It was a principle of the common law that trading with an enemy, without the king's license, was illegal in British subjects." *Potts v. Bell*, 8 Term R. 548. Some writers class such agreements among those in breach of express rules of the common law.

¹⁴⁹ *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; *Boyle v. Adams*, 50 Minn. 255, 52 N. W. 860, 17 L. R. A. 96; *Conway v. Post Co.*, 190 Ill. 89, 60 N. E. 82; *Baird v. Sheehan*, 38 App. Div. 7, 56 N. Y. Supp. 228, affirmed 166 N. Y. 631, 60 N. E. 1107. See, also, *Kine v. Turner*, 27 Or. 356, 41 Pac. 664. Cf. *Hyer v. Traction Co.*, 168 U. S. 471, 18 Sup. Ct. 115, 42 L. Ed. 547; *ante*, p. 258.

¹⁵⁰ *Greenh. Pub. Pol.* p. 383.

¹⁵¹ *Reed v. Warehouse Co.*, 2 Mo. App. 82.

¹⁵² *Pingry v. Washburn*, 1 Aikens (Vt.) 264, 15 Am. Dec. 676. This rule does not apply to opposition to private legislation on purely private grounds. *Greenh. Pub. Pol. rule* 317, p. 384.

¹⁵³ *Usher v. McBratney*, 3 Dill. 385, Fed. Cas. No. 16,805.

¹⁵⁴ *Slocum v. Wooley*, 43 N. J. Eq. 451, 11 Atl. 264.

ing or not opposing a public improvement or other public project,¹⁵⁵ or withdrawing his petition for such an improvement.¹⁵⁶

Any agreement which tends to impair the integrity of public elections is clearly contrary to public policy.¹⁵⁷ "Every voter is bound to use his influence to promote the public good according to his own honest opinions and convictions of duty, and if, for money or other personal profit, he agrees to exert his influence against what he believes to be for the public good, he is corrupt, and the agreement void."¹⁵⁸ A promise, therefore, in consideration of the promisee's voting for the promisor for a public office,¹⁵⁹ or procuring his nomination,¹⁶⁰ or aiding in procuring his election,¹⁶¹ or of withdrawing himself as a candidate for election,¹⁶² or a promise to pay money if a certain candidate shall be elected, is illegal and void. A bet on the result of an election is illegal even in the absence of a statutory prohibition.¹⁶³

¹⁵⁵ *Howard v. Independent Church*, 18 Md. 451; *Maguire v. Smock*, 42 Ind. 1, 13 Am. Rep. 353; *Smith v. Applegate*, 23 N. J. Law, 352; *Doane v. Railway Co.*, 160 Ill. 22, 45 N. E. 507, 35 L. R. A. 588; *Greer, Hawes & Co. v. Severson*, 119 Iowa, 84, 93 N. W. 72 (consent of property holder required by statute to establishment of saloon). Where the opposition is on purely private grounds, it has been held that the rule does not apply. *Weeks v. Lippencott*, 42 Pa. 474. Cf. *Montclair Military Academy v. Railway Co.*, 65 N. J. Law, 328, 47 Atl. 890.

¹⁵⁶ *Jacobs v. Tobiasson*, 65 Iowa, 245, 21 N. W. 590, 54 Am. Rep. 9.

¹⁵⁷ A person who furnishes liquor or refreshments to electors at the request of another, for the purpose of influencing them in their votes, cannot recover therefor. *Duke v. Asbee*, 33 N. C. 112; *Greenh. Pub. Pol.* p. 389.

¹⁵⁸ *Nichols v. Mudgett*, 32 Vt. 546; *Roby v. Carter*, 6 Tex. Civ. App. 295, 25 S. W. 725; *Burden Bank v. Phelps*, 5 Kan. App. 685, 48 Pac. 938.

¹⁵⁹ *Nichols v. Mudgett*, 32 Vt. 546. Ante, p. 286.

¹⁶⁰ *Liness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153; *Livingston v. Page*, 74 Vt. 356, 52 Atl. 965, 59 L. R. A. 336, 93 Am. St. Rep. 901 (to use influence of newspaper to secure nomination).

¹⁶¹ *Stout v. Ennis*, 28 Kan. 706; *Swayze v. Hull*, 8 N. J. Law, 54, 14 Am. Dec. 399; *Ham v. Smith*, 87 Pa. 63. This does not apply to "an agreement to pay for open advocacy of the election of a candidate, or for legitimate political work." *Greenh. Pub. Pol.* 393; *Murphy v. English*, 64 How. Prac. (N. Y.) 362; *Sizer v. Daniels*, 66 Barb. (N. Y.) 426.

¹⁶² *Robinson v. Kalbfleisch*, 5 Thomp. & C. (N. Y.) 212.

¹⁶³ *Lockhart v. Hullinger*, 2 Ill. App. 465; *Gordon v. Casey*, 23 Ill. 70; *Guyman v. Burlingame*, 36 Ill. 201; *Vischer v. Yates*, 11 Johns. (N. Y.) 23; *McAllister v. Hoffman*, 16 Serg. & R. (Pa.) 147, 16 Am. Dec. 556; *Wroth v. Johnson*, 4 Har. & McH. (Md.) 284; *Gregory v. King*, 58 Ill. 169, 11 Am. Rep. 56 (bet in one state on result of presidential election in another); *Greenh. Pub. Pol.* 391.

SAME—AGREEMENTS TENDING TO PERVERT OR OBSTRUCT PUBLIC JUSTICE.

- 158.** Any agreement which tends to pervert or obstruct public justice is contrary to public policy, and void.
- 159. COMPOUNDING CRIME.** An agreement to stifle a criminal prosecution is illegal.
- 160. ARBITRATION.** Agreements to refer matters to arbitration as a condition precedent to suit, at least if not going to the whole question of liability, are valid; but it is otherwise where the agreement is to refer to arbitration alone, and not to sue at all.

Any agreement which tends to pervert or obstruct public justice, even though it may not amount to a crime,¹⁶⁴ is illegal, as being contrary to public policy. If an agreement, for instance, tends to induce a witness to perjure himself, or to give false testimony through bias, or if it tends to induce parties to procure false testimony, it will not be enforced.¹⁶⁵ In an Alabama case a party had promised to give a witness, for attending court, a sum of money in excess of his legal fees, the amount of the compensation to depend on the promisor's success in the suit, and the agreement was held void. "Such contracts," said the court, "are against sound policy, because their inevitable tendency is, if not to invite to perjury, at least to sway the mind of the witness, by giving him the interest of a party to the cause, and thus contaminate the stream of justice at its source."¹⁶⁶ So, also, agreements are illegal if they contemplate the suppression of lawful evidence.¹⁶⁷

¹⁶⁴ Clark, Cr. Law (2d Ed.) 148, 376, and cases cited; *Buck v. Bank*, 27 Mich. 293, 15 Am. Rep. 189. Agreement for feigned suit to test validity of bonds before issue. *Van Horn v. Kittitas County (C. C.)* 112 Fed. 1.

¹⁶⁵ *Gillet v. Logan Co.*, 67 Ill. 256; *Goodrich v. Tenney*, 144 Ill. 422, 33 N. E. 44, 19 L. R. A. 371, 36 Am. St. Rep. 459; *Patterson v. Donner*, 48 Cal. 369; *Greenh. Pub. Pol.* p. 441, and cases cited; *HUTLEY v. HUTLEY*, L. R. 8 Q. B. 112; *Paton v. Stewart*, 78 Ill. 481; *Bowling v. Blum (Tex. Civ. App.)* 52 S. W. 97; *Langdon v. Conlin (Neb.)* 93 N. W. 389, 60 L. R. A. 429. A contract between a physician and a party injured by a railroad company, that the physician shall go to the advisers of the company, and explain the nature of the injuries, and receive as compensation an amount dependent on the amount awarded, is void. *Thomas v. Caulkett*, 57 Mich. 392, 24 N. W. 154, 58 Am. Rep. 369. A contract to procure such testimony as will procure a verdict is void. *Quirk v. Muller*, 14 Mont. 467, 36 Pac. 1077, 25 L. R. A. 87, 43 Am. St. Rep. 647.

¹⁶⁶ *Dawkins v. Gill*, 10 Ala. 206. There are many cases which hold that an agreement by a party to pay a witness compensation in addition to his legal fees is contrary to public policy. See *Greenh. Pub. Pol.* p. 441.

¹⁶⁷ *Greenh. Pub. Pol.* p. 441. As, where an attorney for a consideration agrees with a person accused of crime to procure the release from jail of a witness against him. *Crisup v. Grosslight*, 79 Mich. 380, 44 N. W. 621.

All agreements, it is said in a late Indiana case, relating to proceedings in courts, civil or criminal, which may involve anything inconsistent with the impartial course of justice, are void, though not open to the charge of actual corruption, and regardless of the good faith of the parties, or of the fact that no evil resulted therefrom.¹⁶⁸

Compounding Crime.

The most obvious example of agreements tending to obstruct public justice are agreements to stifle criminal prosecutions. "You shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of benefit or profit to yourself."¹⁶⁹ Not only is an agreement not to prosecute a person for a crime void on the ground that it is against public policy, but it is void because the agreement is in itself a crime.¹⁷⁰

It has been said that this rule is subject to exceptions in cases where civil and criminal remedies coexist, and that it is permissible in some cases to compromise with the offender, and agree not to prosecute

And see *Bostick v. McClaren*, 2 Brev. (S. C.) 275; *Badger v. Williams*, 1 D. Chip. (Vt.) 137; *Thompson v. Whitman*, 4 Jones (N. C.) 47; *Young v. Thomson*, 14 Colo. App. 294, 59 Pac. 1030. Regulating disclosure of witness. *Wight v. Rindskopf*, 43 Wis. 344. Asserting unjust claims. *Rhodes v. Sparks*, 6 Pa. 473.

¹⁶⁸ *Brown v. Bank*, 137 Ind. 165, 37 N. E. 158, 24 L. R. A. 206 (contract made by justice of peace whereby, in case the justice secures arrest, and the return of stolen property, he is to receive a percentage). See *Weber v. Shay*, 56 Ohio St. 116, 46 N. E. 377, 37 L. R. A. 230, 60 Am. St. Rep. 743 (contract by attorney to prevent indictment). Contract to withdraw opposition to probate of will not void. *Seaman v. Colley*, 178 Mass. 478, 59 N. E. 1017.

¹⁶⁹ *WILLIAMS v. BAYLEY*, L. R. 1 H. L. 200. And see *Collins v. Blanton*, 2 Wils. 341, 1 Smith. Lead. Cas. 387, notes; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Roll v. Raguett*, 4 Ohio, 400, 22 Am. Dec. 759; *McMahan v. Smith*, 47 Conn. 221, 36 Am. Rep. 67; *Chandler v. Johnson*, 39 Ga. 85; *Schultz v. Culbertson*, 46 Wis. 313, 1 N. W. 19; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Ricketts v. Harvey*, 106 Ind. 504, 6 N. E. 325; *Gorham v. Keyes*, 137 Mass. 583; *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; *Smith v. Steely*, 80 Iowa, 738, 45 N. W. 912; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419; *Davis v. Smith*, 68 N. H. 253, 44 Atl. 384, 73 Am. St. Rep. 584; *Kirkland v. Benjamin*, 67 Ark. 480, 55 S. W. 840; *Smith Premier Typewriter Co. v. Mayhew (Neb.)* 90 N. W. 993. A prosecution for seduction cannot be compounded. *Budd v. Rutherford*, 4 Ind. App. 386, 30 N. E. 1111. Nor prosecution for obstructing a highway. *Amestoy v. Transit Co.*, 95 Cal. 311, 30 Pac. 550. A contract not to sue for pollution of stream, amounting to public nuisance, is void. *Weston Paper Co. v. Comstock (Ind. Sup.)* 58 N. E. 79. It makes no difference whether the agreement is express or implied. *Janis v. Roentgen*, 52 Mo. App. 114. If no crime was in fact committed, the contract is not illegal. *Smith v. Blackley*, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887; *Treadwell v. Tobert*, 122 Ala. 297, 25 South. 216; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398. But see *State v. Carver*, 69 N. H. 216, 39 Atl. 973.

¹⁷⁰ *Clark*, Cr. Law (2d Ed.) 383.

him. In an English case it was said: "We shall probably be safe in laying it down that the law will permit a compromise of all offenses, though made the subject of a criminal prosecution, for which offenses the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offense is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it."¹⁷¹ In the United States this distinction is not generally recognized, and it is held that an agreement to compound a crime, whether misdemeanor or felony, is illegal.¹⁷²

Of course, persons may always settle any claims they may have against each other, even though the claim may arise from the crime of one of them, as from larceny or embezzlement, provided there is no agreement not to prosecute for the crime.¹⁷³ It is the stifling of prosecutions which renders such agreements invalid. In some states parties are expressly permitted by statute to compromise prosecutions for certain misdemeanors.¹⁷⁴

Reference to Arbitration.

Agreements to refer matters in dispute to arbitration are sometimes regarded as attempts to "oust the jurisdiction of the courts," and to that extent will not be enforced.¹⁷⁵ The most common illustrations

¹⁷¹ *Keir v. Leeman*, 6 Q. B. 321. See, also, *Id.* 9 Q. B. 395; *Windhill Local Board v. Vint*, 45 Ch. D. 351.

¹⁷² *PARTRIDGE v. HOOD*, 120 Mass. 403, 21 Am. Rep. 524; *Wright v. Rindskopf*, 43 Wis. 261; *Pearce v. Wilson*, 111 Pa. 14, 2 Atl. 99, 56 Am. Rep. 243; *Jones v. Dammberg Co.*, 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271. And see *State v. Carver*, 69 N. H. 216, 39 Atl. 973.

¹⁷³ *FLOWER v. SADLER*, 10 Q. B. Div. 572; *NICKELSON v. WILSON*, 60 N. Y. 362; *Weber v. Barrett*, 125 N. Y. 18, 25 N. E. 1068; *Bothwell v. Brown*, 51 Ill. 234; *Cass County Bank v. Bricker*, 34 Neb. 516, 52 N. W. 575, 33 Am. St. Rep. 649; *Fosdick v. Van Arsdale*, 74 Mich. 302, 41 N. W. 931; *Portner v. Kirschner*, 169 Pa. 472, 32 Atl. 442, 47 Am. St. Rep. 925; *Sloan v. Davis*, 105 Iowa, 97, 74 N. W. 922; *Powell v. Flanary*, 109 Ky. 342, 59 S. W. 5; *Paige v. Hieronymus*, 192 Ill. 546, 61 N. E. 832.

¹⁷⁴ *Brown v. McCreight*, 187 Pa. 181, 41 Atl. 45.

¹⁷⁵ *Mutual Reserve Fund Life Ass'n v. Woolen Mills*, 82 Fed. 508, 27 C. C. A. 212. Agreement between fidelity insurance company and employé whose honesty is guaranteed that voucher showing payment by company to employer of loss occasioned through employé's dishonesty should be conclusive evidence against employé as to fact and extent of his liability to company, was void as against public policy. *Fidelity & Casualty Co. of New York v. Eickhoff* (Minn.) 65 N. W. 351; *Fidelity & Casualty Co. of New York v. Crays*, 76 Minn. 450, 79 N. W. 531. Stipulation in contract entered into between Italian citizens, partly to be performed in Italy and partly in United States, that Italian courts should have exclusive jurisdiction of actions thereon, is not so objectionable, on grounds of public policy, that Massachusetts courts will refuse to give it the validity which it has under the Italian law, under the treaty with Italy, which gives citizens of each country

of such agreements are provisions in a building or construction contract for determination of questions by the architect or engineer, and in insurance policies for submission to arbitrators to determine the loss, though of course they are not limited to these contracts. An agreement to refer to arbitration, though so far valid that an action can be maintained for its breach,¹⁷⁶ will not be specifically enforced,¹⁷⁷ and does not oust the jurisdiction of the court; that is, it cannot be set up as a bar to an action brought to determine the very dispute which it was agreed to refer.¹⁷⁸ Parties to a contract may, however, make arbitration a condition precedent to a right of action for breach of the contract, and such a condition is valid.¹⁷⁹ It is very generally declared that an agreement to submit to arbitration the whole question of liability, and not merely those questions which affect the amount of damages, is void, even as a condition precedent.¹⁸⁰ Upon principle,

full rights in the courts of the other. *MITTENTHAL v. MASCAGNI*, 66 N. E. 425, 183 Mass. 19, 60 L. R. A. 812.

¹⁷⁶ *LIVINGSTON v. RAILLI*, 5 El. & B. 132; *Munson v. Straits of Dover S. S. Co.*, 102 Fed. 926, 43 C. C. A. 57, affirming (D. C.) 99 Fed. 787. See *Pollock*, Cont. (3d Ed.) 308.

¹⁷⁷ *Street v. Rigby*, 6 Ves. 815, 818.

¹⁷⁸ *Hurst v. Litchfield*, 39 N. Y. 377; *Chamberlain v. Railroad Co.*, 54 Conn. 472, 9 Atl. 244; *Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354; *WHITE v. RAILROAD CO.*, 135 Mass. 216; *Mentz v. Insurance Co.*, 79 Pa. 480; *REED v. INSURANCE CO.*, 138 Mass. 572; *Allegre v. Insurance Co.*, 6 Har. & J. (Md.) 408, 14 Am. Dec. 289; *Kinney v. Association*, 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142; *HAMILTON v. INSURANCE CO.*, 137 U. S. 370, 11 Sup. Ct. 133, 34 L. Ed. 708; *Lesure Lumber Co. v. Insurance Co.*, 101 Iowa, 514, 70 N. W. 761; *Voluntary Relief Department v. Spencer*, 17 Ind. App. 123, 46 N. E. 477; *MILES v. SCHMIDT*, 168 Mass. 339, 47 N. E. 115; *Fox v. Association*, 96 Wis. 390, 71 N. W. 363; *Mitchell v. Dougherty*, 90 Fed. 639, 33 C. C. A. 205; *Kant v. Rice* (Ky.) 55 S. W. 202; *Hartford Fire Ins. Co. v. Horr* (Neb.) 92 N. W. 746. But see *Raymond v. Insurance Co.*, 114 Mich. 386, 72 N. W. 254; *Robinson v. Templar Lodge*, 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193.

¹⁷⁹ *SCOTT v. AVERY*, 5 H. L. Cas. 811; *Viney v. Rignold*, 20 Q. B. D. 172; *President, etc., of Delaware & H. Canal Co. v. Coal Co.*, 50 N. Y. 250; *HAMILTON v. INSURANCE CO.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Smith v. Railroad Co.*, 36 N. H. 458; *Hudson v. McCartney*, 33 Wis. 331; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283, 10 N. W. 504; *Berry v. Carter*, 19 Kan. 135; *Reed v. Insurance Co.*, 138 Mass. 572; *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Denver & N. O. Const. Co. v. Stout*, 8 Colo. 61, 5 Pac. 627; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 562; *Fisher v. Insurance Co.*, 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; *National Contracting Co. v. Water Power Co.*, 170 N. Y. 439, 63 N. E. 450. But see *Phoenix Ins. Co. v. Zlotky* (Neb.) 92 N. W. 736.

¹⁸⁰ See *Stephenson v. Insurance Co.*, 54 Me. 55; *Perry v. Cobb*, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389; *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648; *Mitchell v. Dougherty*, 90 Fed. 639, 33 C. C. A. 205. See, also, cases cited notes 178, 179.

however, it seems that such a condition should be given effect in the one case as in the other, and that to do so is in no sense to oust the jurisdiction of the court.¹⁸¹

SAME — ENCOURAGEMENT OF LITIGATION — CHAMPERTY AND MAINTENANCE.

161. In most states an agreement amounting to maintenance or champerty is considered contrary to public policy because of its tendency to encourage litigation. In some states, however, the doctrine is scarcely recognized.

"Maintenance" is defined in the old books as the officious intermeddling in a suit by one who has no interest therein, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it.¹⁸² "Champerty" is defined as a bargain by a person with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit or defense at his own expense. In other words, champerty is "maintenance aggravated by an agreement to have a part of the thing in dispute."¹⁸³ Some courts have held that the champertor need not carry on the suit at his own expense,—that it may be where an attorney agrees to conduct a suit for a compensation contingent on success;¹⁸⁴ but the weight of authority is to the contrary. Champerty and maintenance are held to be crimes at common law in England, and are so recognized in many states. In many jurisdictions, however, neither maintenance nor champerty is recognized as a crime, but they are held to render agreements illegal on the ground of public policy. In some states the doctrine is scarcely recognized at all, the courts considering that, because of the difference in the state of society

¹⁸¹ SCOTT v. AVERY, 5 H. L. C. 811; COLLINS v. LOCKE, 4 App. Cas. 674; Spackman v. Plumstead Board of Works, 10 App. Cas. 229. See "Arbitration as a condition precedent," by Addison C. Barnham, 11 Harv. L. R. 234. Where the rules or by-laws of an association so provide, a member must exhaust his remedies in its tribunals before resorting to the courts. *Jean v. Grand Lodge*, 86 Me. 434, 30 Atl. 70; *Smith v. Ocean Castle* No. 11, 59 N. J. Law, 198, 35 Atl. 917; *Whitty v. McCarthy*, 20 R. I. 792, 36 Atl. 129; *Myers v. Jenkins*, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613.

¹⁸² 4 Bl. Comm. 134; 1 Hawk. P. C. 249.

¹⁸³ 4 Bl. Comm. 135; 1 Hawk. P. C. 257; THOMPSON v. REYNOLDS, 73 Ill. 11; *Torrence v. Shedd*, 112 Ill. 466.

¹⁸⁴ *Lathrop v. President, etc.*, 9 Mete. (Mass.) 489; ACKERT v. BARKER, 131 Mass. 436. Contra, *Aultman v. Waddle*, 40 Kan. 195, 19 Pac. 730; *Phillips v. Commissioners*, 119 Ill. 626, 10 N. E. 230; *Winslow v. Railway Co.*, 71 Iowa, 197, 32 N. W. 330; *Pittsburg, C., C. & St. L. Ry. v. Volkert*, 58 Ohio St. 362, 50 N. E. 924.

in England and in this country, the reasons which make the doctrine salutary or necessary there do not exist here.¹⁸⁵

Maintenance.

"A contract," says Greenhood, "by which a stranger is to sustain the expense of the prosecution or defense of litigation, especially when he is to have an interest in the result thereof, is void;" and the rule thus laid down is sustained by numerous cases, both in England and in this country.¹⁸⁶

Illustrations of maintenance are where a stranger to a cause of action induces the person who has the right of action to sue by promising to save him harmless from any liability for costs, or to pay the costs in case of failure in the action.¹⁸⁷ It has generally been deemed necessary, in order to avoid a contract, that there should be something vexatious in the maintenance, and that mere assistance was not enough; that maintenance "is confined to cases where a man improperly, and for the purpose of stirring up litigation and strife, encourages others either to bring actions or to make defenses which they have no right to make."¹⁸⁸ This is probably the general rule in this country where the doctrine of maintenance is recognized at all.¹⁸⁹

It is not maintenance for a person to assist another in litigation, if he is himself interested in the subject of the litigation,¹⁹⁰ or if he in

¹⁸⁵ *Richardson v. Rowland*, 40 Conn. 565; *Stoddard v. Mix*, 14 Conn. 12; *Brown v. Bigne*, 21 Or. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. Rep. 752; *Bayard v. McLane*, 3 Har. (Del.) 139; *Schamp v. Schenck*, 40 N. J. Law, 195, 29 Am. Rep. 219; *Hoffman v. Vallejo*, 45 Cal. 564; *Bentinek v. Franklin*, 38 Tex. 458; *Sherley v. Riggs*, 11 Humph. (Tenn.) 53. The common law in relation to champerty has been virtually abolished or superseded by statute in several states. *Willey v. Crane*, 63 Mich. 720, 30 N. W. 327; *Heaton v. Dennis*, 103 Tenn. 155, 52 S. W. 175; *Potter v. Mining Co.*, 22 Utah, 273, 61 Pac. 999. In New York it is abolished, except in so far as it is embodied in statutes in reference to certain cases affecting the title to lands, and prohibiting the purchase of claims by attorneys for the purpose of suing on them. See *Bundy v. Newton*, 65 Hun, 619, 19 N. Y. Supp. 734; *FOWLER v. CALLAN*, 102 N. Y. 395, 7 N. E. 169; *Coughlin v. Railroad Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Oisher v. Lazzarone*, 61 Hun, 623, 15 N. Y. Supp. 933.

¹⁸⁶ *Greenh. Pub. Pol. rule 324*; *HUTLEY v. HUTLEY*, L. R. 8 Q. B. 112; *Kerr v. Brunton*, 24 U. C. Q. B. 390; *Knox v. Martin*, 8 N. H. 154. And see the cases in the following notes.

¹⁸⁷ *Wheeler v. Pounds*, 24 Ala. 472; *Low v. Hutchinson*, 37 Me. 196; *Martin v. Amos*, 35 N. C. 201.

¹⁸⁸ *Findon v. Parker*, 11 Mees. & W. 682. Cf. *Bradlaugh v. Newdegate*, 11 Q. B. Div. 10.

¹⁸⁹ See *Perine v. Dunn*, 3 Johns. Ch. (N. Y.) 508; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; *Duke v. Harper*, 66 Mo. 51, 37 Am. Rep. 314; *McCall's Adm'r v. Capehart*, 20 Ala. 521; *Com. v. Dupuy*, Brightly, N. P. (Pa.) 44.

¹⁹⁰ *Williams v. Fowle*, 132 Mass. 385; *Knight v. Sawin*, 6 Greenl. (Me.) 361; *Inhabitants of Industry v. Inhabitants of Starks*, 65 Me. 167; *HUTLEY*

good faith believes that he is so interested,¹⁹¹ or if he is a near relative of the litigant;¹⁹² nor, it seems, for a person to assist one who has a good cause of action, and is too poor to sue.¹⁹³ He must assist, however, because of such interest or relationship.¹⁹⁴

ChamPERTY.

ChamPERTY, or the maintenance of a suit for a share of the proceeds, avoids an agreement made in contemplation of it.¹⁹⁵ A frequent instance of chamPERTY is where an attorney agrees to conduct litigation, and pay the costs, in consideration of a certain part of whatever he may recover. Most of the courts hold such an agreement illegal.¹⁹⁶ "But where the right to compensation is not confined to an interest in the

v. HUTLEY, L. R. 8 Q. B. 112; Board of Com'rs of Bartholomew County *v. Jameson*, 86 Ind. 154; *Cooley v. Osborne*, 50 Iowa, 526. It is not maintenance for several to contribute to the expense of a suit by one where all have a common interest in settling the question as to defendant's liability. *Davies v. Stowell*, 78 Wis. 334, 47 N. W. 370, 10 L. R. A. 190.

¹⁹¹ *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444; *Wellington v. Kelly*, 84 N. Y. 543; *Findon v. Parker*, 11 Mees. & W. 679.

¹⁹² *Thallhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; *Gilleland v. Failing*, 5 Denio (N. Y.) 308; *Morris v. Henderson*, 37 Miss. 492; *Walker v. Perryman*, 23 Ga. 309, at page 316. See *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272. But see *Barnes v. Strong*, 54 N. C. 100; *HUTLEY v. HUTLEY*, L. R. 8 Q. B. 112.

¹⁹³ *Dunne v. Herrick*, 37 Ill. App. 180.

¹⁹⁴ *Greenh. Pub. Pol.* p. 401.

¹⁹⁵ *Gilbert v. Holmes*, 64 Ill. 548; *Coleman v. Billings*, 89 Ill. 183; *Munday v. Whissenhunt*, 90 N. C. 458; *Slade v. Rhodes*, 22 N. C. 24; *Barnes v. Strong*, 54 N. C. 100; *Thompson v. Warren*, 8 B. Mon. (Ky.) 488; *Hayney v. Coyne*, 10 Heisk. (Tenn.) 339; *Jenkins v. Bradford*, 59 Ala. 400; *Martin v. Veeder*, 20 Wis. 466; *Barker v. Barker*, 14 Wis. 131; *Duke v. Harper*, 66 Mo. 51, 37 Am. Rep. 314; *Stanley v. Jones*, 7 Bing. 369; *Sprye v. Porter*, 7 El. & Bl. 81.

¹⁹⁶ *THOMPSON v. REYNOLDS*, 73 Ill. 11; *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Coughlin v. Railroad Co.*, 71 N. Y. 443, 27 Am. Rep. 75; *Lancy v. Havender*, 146 Mass. 615, 16 N. E. 464; *Boardman v. Thompson*, 25 Iowa, 487; *Evans v. Bell*, 6 Dana (Ky.) 479; *Million v. Ohnsorg*, 10 Mo. App. 432; *Scobey v. Ross*, 13 Ind. 117; *Lafferty v. Jelley*, 22 Ind. 471; *Hamilton v. Gray*, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811; *Geer v. Frank*, 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110; *In re Evans*, 22 Utah, 366, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794; *Casserleigh v. Wood*, 119 Fed. 308, 56 C. C. A. 212. It has even been held that, where the attorney has received money under such an agreement for his client, the latter cannot maintain an action to recover it. *Best v. Strong*, 2 Wend. (N. Y.) 319, 20 Am. Dec. 607. Contra, *ACKERT v. BARKER*, 131 Mass. 436; *Stearns v. Felker*, 28 Wis. 594. A contract whereby the client is bound not to settle without the consent of the attorney is void. *Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; *Davis v. Webber*, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81; *Davis v. Chase*, 159 Ind. 242, 64 N. E. 88. See, also, *Potter v. Mining Co.*, 22 Utah, 273, 61 Pac. 999.

thing recovered, but gives a right of action against the party, though pledging the avails of the suit, or part of them, as security for the payment, the agreement is not champertous."¹⁹⁷

A less obvious form of champerty is in the case of a purchase out and out of a right of action. The validity of such an agreement would depend on whether the purchase included any substantial interest beyond a mere right to litigate. If property is bought to which a right to sue attaches, that fact will not avoid the contract,¹⁹⁸ but an agreement to purchase a bare right to sue would not be sustained.¹⁹⁹ "It is not unlawful to purchase an interest in property, though adverse claims exist which make litigation necessary for realizing that interest, but it is unlawful to purchase an interest merely for the purpose of litigation; in other words, the sale of an interest to which a right to sue is incident is good, but the sale of a mere right to sue is bad."²⁰⁰

As we have stated above, it is not regarded as maintenance for a near relative to assist a person in litigation. This rule, however, does not apply to champerty. Not even a relative can assist for a share of the recovery. "Lineal kinship in the first degree, or apparent heirship, and to a certain extent, it seems, any degree of kindred or affinity, or the relation of master and servant, may justify acts which, as between strangers, would be maintenance; but blood relationship will not justify champerty."²⁰¹

It should be noted that the defense of champerty or maintenance cannot be set up to defeat a recovery on the cause of action to which

¹⁹⁷ *BLAISDELL v. AHERN*, 144 Mass. 393, 11 N. E. 681. See, also, *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746; *Hadlock v. Brooks*, 178 Mass. 425, 59 N. E. 1009. Contra, *Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456. The rules governing champerty are not applicable to the prosecution of a claim otherwise than by suit. *Manning v. Sprague*, 148 Mass. 18, 18 N. E. 673, 1 L. R. A. 516, 12 Am. St. Rep. 508 (court of commissioners of Alabama claims). See, also, *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983; *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64.

¹⁹⁸ *Dickinson v. Burrell*, 1 Eq. 337, 342.

¹⁹⁹ *Prosser v. Edmonds*, 1 Younge & C. 499; *Norton v. Tuttle*, 60 Ill. 130; *Brush v. Sweet*, 38 Mich. 574; *Illinois Land & Loan Co. v. Speyer*, 138 Ill. 137, 27 N. E. 931; *Storrs v. Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211; *Milwaukee & St. P. R. Co. v. Railroad Co.*, 20 Wis. 174, 88 Am. Dec. 740; *Archer v. Freeman*, 124 Cal. 528, 57 Pac. 474; *Haseltine v. Smith*, 154 Mo. 404, 55 S. W. 633; *Miles v. Association (Wis.)* 84 N. W. 159. See *Greenhood*, Pub. Pol. pp. 409-411. Conveyance of land held adversely by another. *Smith v. Price (Ky.)* 7 S. W. 918; *Combs v. McQuinn (Ky.)* 9 S. W. 495; *Nelson v. Brush*, 22 Fla. 374; *Snyder v. Church*, 24 N. Y. Supp. 337, 70 Hun, 428.

²⁰⁰ Pol. Cont. (3d Ed.) 315.

²⁰¹ Pol. Cont. (3d Ed.) 320; *HUTLEY v. HUTLEY*, L. R. 8 Q. B. 112; In re *Evans*, 22 Utah, 366, 62 Pac. 913, 53 L. R. A. 952, 83 Am. St. Rep. 794.

the illegal agreement relates. It can only be set up against the enforcement of the illegal agreement itself.²⁰²

SAME—AGREEMENTS OF IMMORAL TENDENCY.

162. Any agreement which is contrary to established rules of decency and morality is contrary to public policy.

Agreements which are contrary to established rules of decency and morality, though the acts to which they tend may not be prohibited in the sense of rendering the doer liable to a penalty,²⁰³ will not be enforced. Unlawful sexual intercourse is not a crime at common law unless it is open and notorious, but any unlawful sexual intercourse is *contra bonos mores*. A promise, therefore, given in consideration of present or future illicit cohabitation or intercourse, is void;²⁰⁴ and it is immaterial, in such case, whether the contract is by parol or under seal, for, as we have seen, though no consideration is necessary to support a promise under seal, yet, if there is a consideration, its illegality will avoid the contract.

A promise made in consideration of past illicit cohabitation is not generally held to be made on an illegal consideration, but is a mere gratuitous promise, because the consideration is past, and is not en-

²⁰² *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Hilton v. Woods*, L. R. 4 Eq. 432; *Courtright v. Burnes* (C. C.) 3 McCrary, 60, 13 Fed. 317; *Pennsylvania Co. v. Lombardo*, 49 Ohio St. 1, 29 N. E. 573, 14 L. R. A. 785; *SMALL v. RAILROAD CO.*, 55 Iowa, 583, 8 N. W. 437; *Chamberlain v. Grimes*, 42 Neb. 701, 60 N. W. 948; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557; *Potter v. Mining Co.*, 22 Utah, 273, 61 Pac. 999; *Ellis v. Smith*, 112 Ga. 480, 37 S. E. 739. *Contra*, *Barker v. Barker*, 14 Wis. 131; *Allard v. Lamirande*, 29 Wis. 502; *Heaton v. Dennis*, 103 Tenn. 155, 52 S. W. 175; *Miles v. Association*, 108 Wis. 421, 84 N. W. 159. See, also, *The Clara A. McIntyre* (D. C.) 94 Fed. 552 (distinguishing *Barnes v. Scott*, *supra*, on ground that here suit was in name of champertor to whom note and mortgage had been assigned).

²⁰³ A policy obtained by one on his own life, payable to himself, his executors, administrators, or assigns, which is silent on the subject of suicide, becomes void if the insured commits suicide when sane, both from the presumed intention of the parties and from principles of public policy. *Ritter v. Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693.

²⁰⁴ *Ayerst v. Jenkins*, 16 Eq. 275; *Wallace v. Rappleye*, 103 Ill. 229; *Walker v. Perkins*, 3 Burrows, 1568; *Baldy v. Stratton*, 11 Pa. 316; *Massey v. Wallace*, 32 S. C. 149, 10 S. E. 937; *Drennan v. Douglas*, 102 Ill. 341, 40 Am. Rep. 535; *Hanks v. Naglee*, 54 Cal. 51, 35 Am. Rep. 67; *Forsythe v. State*, 6 Ohio. 20; *Walker v. Gregory*, 36 Ala. 180; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 Am. Dec. 555; *Goodall v. Thurman*, 1 Head (Tenn.) 209; *Saxon v. Wood*, 4 Ind. App. 242, 30 N. E. 797.

forceable if made by parol, though it is binding if made under seal.²⁰⁵ It has been held that, if the past illicit cohabitation was accompanied by seduction, there is sufficient consideration to support a parol promise;²⁰⁶ but this is contrary to the well-settled doctrine that a moral obligation is no consideration for a promise, and the weight of authority is the other way.²⁰⁷

An agreement may be innocent in itself, but may be intended to further an immoral purpose. The effect of such agreements will be considered later.²⁰⁸

SAME—AGREEMENTS TENDING TO FRAUD AND BREACH OF TRUST.

163. Any agreement which has a direct tendency to induce a person to commit a fraud upon the rights of others, or a breach of trust and confidence, is illegal as being contrary to public policy.

"Contracts," it has been said, "which are opposed to open, upright, and fair dealings, are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. * * * The law will not only avoid contracts, the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons."²⁰⁹ Although the act contracted to be done

²⁰⁵ Gray v. Mathias, 5 Ves. 286; BEAUMONT v. REEVE, 8 Q. B. 483; Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; BROWN v. KINSEY, 81 N. C. 245; Massey v. Wallace, 32 S. C. 149, 10 S. E. 937; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; Wyant v. Leshner, 23 Pa. 338. But see Wallace v. Rappleye, 103 Ill. 229, at page 249; McDonald v. Fleming, 12 B. Mon. (Ky.) 285.

²⁰⁶ Smith v. Richards, 29 Conn. 232; Shenk v. Mingle, 13 Serg. & R. (Pa.) 29.

²⁰⁷ Ante, pp. 108, 142.

²⁰⁸ Post, p. 327.

²⁰⁹ Greenh. Pub. Pol. 294; Edwards v. Estell, 48 Cal. 194; Byrd v. Hughes, 84 Ill. 174, 25 Am. Rep. 442; Forsyth v. Woods, 11 Wall. 484, 20 L. Ed. 207; Rice v. Williams (C. C.) 32 Fed. 437; Gleason v. Railroad Co. (Iowa) 43 N. W. 517; Smith v. Humphreys, 88 Me. 345, 34 Atl. 166. A contract made by a person in contemplation of becoming an officer in a private corporation, and controlling a majority of its stock, that he will use his influence to retain another in office at a fixed salary, is void as against public policy, being inconsistent with the duty that the promisor, as an officer, owes to the stockholders, though no direct private gain is to result therefrom to him. West v. Camden, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254; Gage v. Fisher, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557. For other instances of illegal con-

"may be just and beneficial as between the parties immediately concerned in it, and though it be accomplished in good faith and without undue means, yet the contract to procure to be done is held to be against public policy, because its natural effect is to cause the party to abuse the confidence placed in him, * * * and thereby prejudicially to affect the rights of others."²¹⁰ It is impossible to go further into the various rules growing out of this principle. They have been admirably stated, and the illustrations and authorities collected, by Greenwood in his work on Public Policy.²¹¹

SAME—AGREEMENTS IN DEROGATION OF THE MARRIAGE RELATION.

164. As a general rule, any agreement which restrains the freedom of parties to marry, or the freedom of choice in marrying, or impairs the sanctity and security of the marriage relation, or is otherwise in derogation of such relation, is contrary to public policy.

Agreements which restrain the freedom of marriage are discouraged on political and social grounds, as injurious to the increase of popula-

tracts by officers of corporations, see *Wilbur v. Stoepel*, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568; *Attaway v. Bank*, 93 Mo. 485, 5 S. W. 16; *Lum v. McEwen*, 56 Minn. 278, 57 N. W. 662; *GUERNSEY v. COOK*, 120 Mass. 501; *Dickson v. Kittson*, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447. It tends to a fraud on a corporation for its officers to purchase claims against it, and a contract for such a purchase cannot be enforced. *McDonald v. Haughton*, 70 N. C. 393. A good illustration of such an agreement is where a broker employed to sell property is also employed by the person to whom he sells to buy, thus to receive a commission from both parties. *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Everhart v. Searle*, 71 Pa. 256. And see *HOLCOMB v. WEAVER*, 136 Mass. 265. So, also, where a broker is employed to sell land, an agreement with a person who wishes to buy, by which the broker is to introduce him to the principal, and receive part of the land when purchased, is void. *Smith v. Townsend*, 109 Mass. 500. An agreement between real-estate agents representing different principals to divide commissions in case they effect sale is void. *Levy v. Spencer*, 18 Colo. 532, 33 Pac. 415, 36 Am. St. Rep. 303. See *Tiffany*, Ag. 415 et seq. An agreement by a client releasing his attorney from all the duties of the relationship is void. *In re Boone* (C. C.) 83 Fed. 944. A stipulation in a contract that false representations used in procuring it shall not affect its validity is itself invalid. *Hoffin v. Moss*, 67 Fed. 440, 14 C. C. A. 459.

²¹⁰ *Spinks v. Davis*, 32 Miss. 152. See, also, *Harrington v. Dock Co.*, 3 Q. B. Div. 549; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385. The rule does not apply to a case in which a broker is acting as agent of both parties with their knowledge. *Greenhood*, Pub. Pol. Rule 262; *Shaw v. Andrews*, 9 Cal. 73; *Pugsley v. Murray*, 4 E. D. Smith (N. Y.) 245; *Bonwell v. Howes* (City Ct. N. Y.) 1 N. Y. Supp. 435; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528.

²¹¹ *Greenh. Pub. Pol.* pp. 292-326.

tion and the moral welfare of the citizen. Agreements not to marry are therefore void. A promise to marry no one but the promisee, for instance, on penalty of paying her a certain sum, has been held void because there was no promise of marriage on either side, and the agreement was purely restrictive.²¹² So, also, a wager in which one man bet another that he would not marry within a certain time was held void, as giving to one of the parties a pecuniary interest in not marrying.²¹³

Contracts restraining the freedom of choice in entering into a marriage, such as marriage brocage contracts, or promises made upon consideration of the procuring or bringing about of a marriage, are held illegal on social grounds.²¹⁴

Agreements are also contrary to public policy if they directly tend to disturb or prejudice the status of a lawful marriage after it has been entered into. Agreements for separation of husband and wife are valid if made in prospect of an immediate separation;²¹⁵ but if they provide for a possible separation in the future they are illegal, and it is immaterial whether they are made before or after marriage, because they give inducements to the parties not to perform "duties in the fulfillment of which society has an interest."²¹⁶ "An agreement

²¹² *Lowe v. Peers*, 4 Burrows, 2225. See *Hogan v. Curtin*, 88 N. Y. 162, 42 Am. Rep. 244. Where a contract to care for another during his life, and not to marry, is performed, it will be enforced, notwithstanding that the promise not to marry is void. *KING v. KING*, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635.

²¹³ *Hartley v. Rice*, 10 East, 22. And see *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586; *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151; *STERLING v. SINICKSON*, 5 N. J. Law, 756; *Bostick v. Blades*, 59 Md. 231, 43 Am. Rep. 548. But see *Shafer v. Senseman*, 125 Pa. 310, 17 Atl. 350.

²¹⁴ *Arundel v. Trevillian*, Rep. Ch. 47; *Crawford v. Russell*, 62 Barb. (N. Y.) 92; *DUVAL v. WELLMAN* (Com. Pl. N. Y.) 1 N. Y. Supp. 70; *Id.*, 124 N. Y. 156, 26 N. E. 343; *Johnson's Adm'r v. Hunt*, 81 Ky. 321. A promise by one engaged to pay another if he induces the other party to the engagement to marry the promisor is void. *Morrison v. Rogers*, 115 Cal. 252, 46 Pac. 1072, 56 Am. St. Rep. 95.

²¹⁵ *Hunt v. Hunt*, 4 De Gex, F. & J. 221; *Fox v. Davis*, 113 Mass. 255, 18 Am. Rep. 476; *Brown v. Brown*, 5 Gill (Md.) 249; *Jenkins v. Hall*, 26 Or. 79, 37 Pac. 62; *Walker v. Walker*, 9 Wall. 743, 19 L. Ed. 814; *Helms v. Franciscus*, 2 Bland (Md.) 544, 20 Am. Dec. 402; *Wells v. Stout*, 9 Cal. 479; *Com. v. Richards*, 131 Pa. 209, 18 Atl. 1007; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324; *Clark v. Fosdick*, 118 N. Y. 7, 22 N. E. 1111, 6 L. R. A. 132, 16 Am. St. Rep. 733; *Carey v. Mackey*, 82 Me. 516, 20 Atl. 84, 9 L. R. A. 113, 17 Am. St. Rep. 500; *Grime v. Borden*, 166 Mass. 198, 44 N. E. 216. *Contra*, *Baum v. Baum*, 109 Wis. 47, 85 N. W. 122, 53 L. R. A. 650, 83 Am. St. Rep. 854; *Foote v. Nickerson*, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554. *Cf. Boland v. O'Neil*, 72 Conn. 217, 44 Atl. 15.

²¹⁶ *Cartwright v. Cartwright*, 3 De Gex, M. & G. 982; *Westmeath v. Westmeath*, 1 Dow. & C. 519; *Randall v. Randall*, 37 Mich. 563; *Brun v. Brun*, 64 Neb. 782, 90 N. W. 860. And see cases in preceding note.

for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. * * * To allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves."²¹⁷

To obtain a divorce by collusion is not only an evasion of justice, but is contrary to public policy, as being in derogation of the marriage relation; and any agreement, therefore, between husband and wife, in consideration of one of them withdrawing or not making opposition to a suit for divorce brought by the other, is void. This applies to any agreement intended to facilitate the procuring of a divorce.²¹⁸ It has been held in a late Massachusetts case that, where a wife has separated from her husband on grounds justifying a suit for divorce, an agreement, for a pecuniary consideration, not to proceed against him for divorce and alimony, and to return and live with him, is contrary to public policy.²¹⁹

It has also been held that contracts between husband and wife regulating their duties and conduct in matters pertaining directly and exclusively to the home cannot be made the subject of public inquiry, and that it is contrary to public policy to recognize and enforce them.²²⁰

²¹⁷ Pol. Cont. (3d Ed.) 286.

²¹⁸ *Besant v. Wood*, 12 Ch. Div. 623; *Hamilton v. Hamilton*, 89 Ill. 349; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191; *Viser v. Bertrand*, 14 Ark. 267; *Adams v. Adams*, 25 Minn. 72; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 313; *Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548. An agreement between a man and his wife, made the day after he has been awarded a decree of divorce, to pay an annuity if she will not move for new trial, is void. *Blank v. Nohl* (Mo.) 19 S. W. 65; *Id.*, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 350. Contract by wife not to sue for alimony for a year is void. *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605. If the promisee is ignorant of the fact that the promisor is already married, she may maintain an action against him for breach of his promise. See *Pad-dock v. Robinson*, 63 Ill. 99, 14 Am. Rep. 112; *Haviland v. Halstead*, 34 N. Y. 643; *Cammerer v. Muller*, 60 Hun, 578, 14 N. Y. Supp. 511; *Id.*, 133 N. Y. 623, 30 N. E. 1147; *Kerns v. Hagenbuehle* (Super. N. Y.) 17 N. Y. Supp. 367. Promise to marry on death of divorced wife held valid. *Brown v. Odill*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914.

²¹⁹ *MERRILL v. PEASLEE*, 146 Mass. 400, 16 N. E. 271, 4 Am. St. Rep. 334 (Holmes, Allen, and Knowlton, JJ., dissenting). And see, contra, *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227.

²²⁰ A contract between husband and wife to drop matters in dispute, refrain from scolding, fault-finding, and anger, and live together as husband and wife; that the wife should keep her home in a comfortable condition; and that the husband provide necessary expenses, and pay the wife a certain sum per month, held illegal. *Miller v. Miller*, 78 Iowa, 177, 35 N. W. 464, 42 N. W. 641, 16 Am. St. Rep. 431.

**SAME—AGREEMENTS IN DEROGATION OF PARENTAL
RELATION.**

165. A contract whereby a father deprives himself of the custody of his child is contrary to public policy.

Parental Relation.

A contract by a father for relinquishment of the right to the custody of his child is void as against public policy.²²¹ The trust is personal to the father, and he has no right to dispose of the child to another. Such contracts, however, when carried out, may have the indirect effect of preventing the father from asserting his rights, if the interests of the child so require.²²²

SAME—AGREEMENTS IN RESTRAINT OF TRADE.

166. Any agreement which unreasonably restrains a person from exercising his trade or business is contrary to public policy.

167. A restraint is not unreasonable if it is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.

168. It was formerly thought, and is still held in some jurisdictions, that though the restraint might be unlimited as to time, it could not be unlimited as to space; but modern decisions hold that such a restraint is not invalid, if it is reasonable.

169. Within this class are combinations and agreements tending to prevent competition, enhance prices, and create monopolies, but they had best be treated separately.

A contract in unreasonable restraint of trade is contrary to public policy and void. "The unreasonableness of contracts in restraint of trade and business is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. * * * (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves. (3) They discourage industry and enterprise, and diminish the products of

²²¹ State v. Baldwin, 5 N. J. Eq. 454, 45 Am. Dec. 397; People v. Mercein, 3 Hill (N. Y.) 410, 38 Am. Dec. 644; Brooke v. Logan, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177; Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389; Weir v. Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; Hibbette v. Baines, 78 Miss. 695, 29 South. 80, 51 L. R. A. 839. Cf. Enders v. Enders, 164 Pa. 266, 30 Atl. 129, 27 L. R. A. 56, 44 Am. St. Rep. 598.

²²² See Tiffany, Pers. & Dom. Rel. 253-255.

ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly.²²³ Public policy requires, however, that the freedom of persons to enter into contracts shall not be lightly interfered with. Some restraint of trade, therefore, must be permitted, but we shall see that it must not be unreasonable.

At one time in England it was considered that a contract was contrary to public policy if it placed any restraint at all on a man's right to exercise his trade or calling. Gradually, however, exceptions were recognized, until at last the court, in a leading case, established the rule that a contract in restraint of trade, upon consideration which shows it was reasonable for the parties to enter into it, is good; "that wherever a sufficient consideration appears to make it a proper and useful contract,²²⁴ and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, but with this constant diversity, viz. where the restraint is general, not to exercise a trade throughout the kingdom, and where it is limited to a particular place, for the former of these must be void, being of no benefit to either party, and only oppressive."²²⁵ Although in that case the restraint was limited both as to time and space, so that it did not call for a decision on a contract in general restraint of trade, it has since been assumed in numerous cases, and in some directly decided, that a contract which imposes a restraint which is unlimited as to space is void on its face.²²⁶ In England the law is now settled that a restraint, although unlimited as to space, is valid, if, under the particular circumstances, it is reasonable.²²⁷ Some diversity of opinion exists, however, between the courts of this country.²²⁸

In determining whether a particular restraint is reasonable, the court will consider the nature and extent of the trade or business, the situation of the parties, and all the other circumstances. If, on such a consideration, the restraint seems unreasonable, the contract will be declared void, however partial the restraint may be. As said in a leading case, the court will consider "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable.

²²³ *Alger v. Thacher*, 19 Pick. (Mass.) 51, 31 Am. Dec. 119.

²²⁴ A contract in restraint of trade must be based on a sufficient consideration. Ante, p. 114. See *Chapin v. Brown*, 83 Iowa, 156, 48 N. W. 1074, 12 L. R. A. 428, 32 Am. St. Rep. 297; *Cleaver v. Lenhart*, 182 Pa. 285, 37 Atl. 811. And see *Urmston v. Whitelegg*, 63 Law. T. 455.

²²⁵ *MITCHELL v. REYNOLDS*, 1 P. Wms. 181.

²²⁶ Post, p. 308.

²²⁷ Post, p. 309.

²²⁸ Post, p. 809.

Whatever is injurious to the interests of the public is void on the ground of public policy."²²⁹

To illustrate this rule, a retail merchant, a mechanic, or a professional man, whose trade or business does not extend beyond the limits of the city in which he does business, or the immediate neighborhood, may, on selling his business, bind himself not to engage in the same business in that city or neighborhood. This is clearly necessary to protect the interests of the other party.²³⁰ On the other hand, it could only oppress him, and could not benefit the other party, to uphold a promise not to engage in the same business anywhere in the state, and such a promise would be unreasonable and void.²³¹ We can even imagine cases in which an agreement by a person, on selling his business, not to engage in the same business in the same city, would be unreasonable; as, for instance, in case of a small bakery in a large city, the trade of which is only in the vicinity of the shop. Again, a

²²⁹ *Horner v. Graves*, 7 Bing. 735. See, also, *ROUSILLON v. ROUSILLON*, 14 Ch. Div. 358; *HERRESHOFF v. BOUTINEAU*, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850; *Keeler v. Taylor*, 53 Pa. 467, 91 Am. Dec. 221; *Arnold v. Kreutzer*, 67 Iowa, 214, 25 N. W. 138; *Ellerman v. Stockyards Co.*, 49 N. J. Eq. 217, 23 Atl. 287; *Gill v. Ferris*, 82 Mo. 156; *Tecktonius v. Scott*, 110 Wis. 441, 86 N. W. 672; *Harrison v. Sugar Refining Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; *Fisheries Co. v. Lennen (C. C.)* 116 Fed. 217; *Kronsnabel-Smith Co. v. Kronsnabel*, 87 Minn. 230, 91 N. W. 892; *Trentman v. Wahrenburg*, 30 Ind. App. 304, 65 N. E. 1057. Injury to the interests of the public is always to be taken into consideration. See *Western Wooden-Ware Ass'n v. Starkey*, 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686.

²³⁰ *Washburn v. Dosch*, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873; *Dwight v. Hamilton*, 113 Mass. 175; *Finger v. Hahn*, 42 N. J. Eq. 606, 8 Atl. 654; *Linn v. Sigsbee*, 67 Ill. 75; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634; *Smith v. Leady*, 47 Ill. App. 441; *McClurg's Appeal*, 58 Pa. 51; *Boutelle v. Smith*, 116 Mass. 111. An agreement not to sell a particular line of goods in a certain town may be valid, *Clark v. Crosby*, 37 Vt. 188; or not to sell to anybody in certain town or state except promisee, *Newell v. Meyendorff*, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738; *Roller v. Ott*, 14 Kan. 609; *Keith v. Optical Co.*, 48 Ark. 138, 2 S. W. 777. The following agreements have been held a reasonable restraint: Covenant in deed not to sell intoxicating liquors on premises in less quantities than five gallons, *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274; or not to carry on trading or mercantile business thereon, *Morris v. Manufacturing Co.*, 83 Ala. 565, 3 South. 689. Agreement by vendee of land not to sell sand from it. *Hodge v. Sloan*, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816. Not to manufacture ochre in certain county. *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251. Not to use premises sold for hotel. *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 824. Covenant by lessee not to sell any beer on premises except that made by a certain company. *Ferris v. Brewing Co.*, 155 Ind. 539, 58 N. E. 701.

²³¹ See *HERRESHOFF v. BOUTINEAU*, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850.

wholesale merchant selling only in a particular section of the country could not, on selling his business, bind himself not to engage in the same business anywhere in the United States, though the restriction would be valid if limited to the district covered by his trade, even though it might extend over several states.²³² The business of some wholesale houses extends over the entire United States, and even further; and the courts, as we shall see, show a tendency in some of the modern cases to allow a restriction coextensive with the business. Other courts, however, looking upon the restraint as general, hold it void on its face for that reason alone, without regard to what the interests of the other party may require.

A contract between manufacturers or dealers, not incidental to a sale of the business, to refrain from selling or competing, tending, as it does, to destroy competition, and not being necessary for the protection of the promisee, has been held unreasonable and void.²³³

Restraint Unlimited as to Space.

As we have already stated, it was for a long time thought, both in England and with us, that a contract in restraint of trade was void on its face if the restraint was unlimited as to space, and there are modern cases laying down the same rule.²³⁴

²³² See *DIAMOND MATCH CO. v. ROEBER*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464.

²³³ *Fox Solid Pressed Steel Co. v. Schoen* (C. C.) 77 Fed. 29; *Clark v. Needham*, 125 Mich. 84, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559; *Culp v. Love*, 127 N. C. 457, 37 S. E. 476. Contra, *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357. And see *Oakes v. Water Co.*, 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544.

²³⁴ *Alger v. Thacher*, 19 Pick. (Mass.) 51; *BISHOP v. PALMER*, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; *Dean v. Emerson*, 102 Mass. 480; *Thomas v. Miles' Adm'r*, 3 Ohio St. 274; *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355; *Peltz v. Eichele*, 62 Mo. 171; *Sutton v. Head*, 86 Ky. 156, 5 S. W. 410, 9 Am. St. Rep. 274; *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251; *Warfield v. Booth*, 33 Md. 63; *Goodman v. Henderson*, 58 Ga. 567; *Lufkin Rule Co. v. Fringeli*, 57 Ohio St. 596, 49 N. E. 1030, 41 L. R. A. 185, 63 Am. St. Rep. 736; *Harding v. Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189 (Cf. *Lanzit v. Manufacturing Co.*, 184 Ill. 326, 56 N. E. 393, 75 Am. St. Rep. 171); *Union Strawboard Co. v. Bonfield*, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346. See, also, *GAMEWELL FIRE ALARM TELEGRAPH CO. v. CRANE*, 160 Mass. 50, 35 N. E. 98, 22 L. R. A. 673, 39 Am. St. Rep. 458. It was at one time considered that an agreement not to carry on a business anywhere within a state, like an agreement not to carry it on anywhere within the United States, was unlimited as to space, and was invalid as imposing a general restraint, *Taylor v. Blanchard*, 13 Allen (Mass.) 370, 90 Am. Dec. 203; *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186; *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621; *Nobles v. Bates*, 7 Cow. (N. Y.) 307; but this doctrine is now generally repudiated, and such an agreement will be enforced, if, under the circumstances, the restraint is reasonable. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315;

The tendency of the cases is, however, to relax the old rule, and to allow a restraint unlimited in space if it is reasonable, and no broader than is necessary for the protection of the covenantee. Such is the doctrine which is now established in England.²³⁵ Thus, in a recent case,²³⁶ where a patentee and manufacturer of guns and ammunition covenanted with a company to which his patents and business had been transferred not to engage, for twenty-five years, in the business of manufacturing guns and ammunition, it was held that the covenant was not in restraint of trade. "The inquiry as to the validity of all covenants in restraint of trade," said Lord Ashborne, "must now ultimately turn upon whether they are reasonable, and whether they exceed what is reasonably necessary for the covenantee." In this country, also, the tendency of the modern cases is to support a restraint, although unlimited in space, provided it is reasonably necessary for the protection of the promisee.²³⁷

Restraint Unlimited as to Time.

It has been said without qualification that, if the restraint is reasonably limited as to space, the fact that it is unlimited as to time will not render the agreement void; that, for instance, an agreement not to carry on a trade, business, or profession in a certain city is valid, though it may be agreed that it shall never be carried on there.²³⁸ It

Beal v. Chase, 31 Mich. 490; DIAMOND MATCH CO. v. ROEBER, 35 Hun (N. Y.) 421; Id., 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; HERRESHOFF v. BOUTINEAU, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850

²³⁵ ROUSILLON v. ROUSILLON, 14 Ch. Div. 351; BADISCHE ANILIN UND SODA FABRIK v. SCHOTT [1892] 3 Ch. 447; NORDENFELT v. MAXIM-NORDENFELT CO. [1894] App. Cas. 535; Underwood v. Barker [1899] 1 Ch. 300.

²³⁶ NORDENFELT v. MAXIM-NORDENFELT CO. [1894] App. Cas. 535.

²³⁷ DIAMOND MATCH CO. v. ROEBER, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; HERRESHOFF v. BOUTINEAU, 17 R. I. 3, 19 Atl. 712, 8 L. R. A. 469, 33 Am. St. Rep. 850; National Ben. Co. v. Hospital Co., 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; Gibbs v. Gas Co., 130 U. S. 409, 9 Sup. Ct. 553, 32 L. Ed. 979; Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784; Carter v. Alling (C. C.) 43 Fed. 208; Richards v. Seating Co., 87 Wis. 503, 58 N. W. 787; Consumers' Oil Co. v. Nunnemaker, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193; ANCHOR ELECTRIC CO. v. HAWKES, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403; Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; Buck v. Coward, 122 Mich. 530, 81 N. W. 328; National Enameling & Stamping Co. v. Haberman (C. C.) 120 Fed. 415. See "Contracts in Restraint of Trade," by Amasa M. Eaton, Harv. L. R. 128.

²³⁸ Bowser v. Bliss, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93; Angier v. Web-

is clear, however, that the same considerations apply as in the case of a restraint unlimited in space. A restraint unlimited as to time may be necessary to protect the party in whose favor it is imposed, and in such a case it will be upheld; but, if unnecessary, the agreement cannot be sustained.²³⁹

In a leading English case the defendant had entered the service of the plaintiff, who was a druggist carrying on his business in the town of Taunton, as the plaintiff's assistant, under a contract whereby he agreed that he would not, at any time after leaving the plaintiff's service, engage in the business of a druggist and chemist in that town. The agreement was held void in the lower court on the ground that the restraint was larger than the necessary protection of the party in favor of whom it was given required.²⁴⁰ This judgment was reversed on writ of error on the ground that a restriction so extensive in point of time was necessary for the protection of the promisee in the enjoyment of the good will of his trade. "The good will of a trade," it was said by Tindal, C. J., "is the subject of value and price. It may be sold, bequeathed, or become assets in the hand of the personal representative of a trader; and, if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such good will, considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable (as undoubtedly it is not) to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and should be allowed to continue if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative."²⁴¹

Some courts draw a distinction between contracts binding the promisor to desist from the practice of a learned profession, and contracts not to engage in a business which, with its good will, the promisor

ber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; *Cook v. Johnson*, 47 Conn. 178, 36 Am. Rep. 64.

²³⁹ *Hitchcock v. Coker*, 6 Adol. & E. 453; *Smith v. Brown*, 164 Mass. 584, 42 N. E. 101; *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Carri v. Snyder* (N. J. Ch.) 26 Atl. 977; *French v. Parker*, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119; *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946; *Swauson v. Kirby*, 98 Ga. 586, 26 S. E. 71; *Rakestraw v. Lanier*, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154.

²⁴⁰ *Hitchcock v. Coker*, 6 Adol. & E. 438.

²⁴¹ *Hitchcock v. Coker*, 6 Adol. & E. 453. And see *Pemberton v. Vaughan*, 10 Q. B. 87; *Elves v. Crafts*, 10 C. B. 241; *Atkins v. Kinnier*, 4 Exch. (Welsb., H. & G.) 782; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344, 43 Am. Dec. 93.

has sold, holding that in the former case a restraint unlimited in time is unreasonable.²⁴² Thus, in a recent New Jersey case, in which it was held that since a contract imposing a restraint greater than is necessary to protect the party for whose benefit it is imposed is void, a covenant that a physician shall not "at any time thereafter" engage in practice in a certain city is void, because it would prevent him from practicing after the death of the other party.²⁴³ The court considered the English case above mentioned, and held that the reasoning did not apply. "The practice of a physician," it was said, "is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he ceases to exist it necessarily ceases also, and after his death can have neither an intrinsic nor a market value." The contrary, however, has been held in Rhode Island. The reason of the English decisions mentioned above, it was said, "is as valid in the case of a profession as of a trade; for whether, technically speaking, there be any good will attending a profession or not, the professional practice itself would probably sell for more with the restraining contract, if the restraint were unlimited in duration, than it would if the restraint were for the life of the promisee or covenantee only. If the complainant here wished to retire from his practice and sell it, he could probably sell it for more if he would secure the purchaser from competition forever than he could if he could only secure him from such competition during his own life. So, if he wished to take in a partner, he could for the same reason make better terms with him."²⁴⁴

Sale of Secret Process.

A person engaged in manufacturing an article by a secret process may sell the business and secret, and make a valid promise not to divulge the secret to any one else, nor to engage himself at any time in manufacturing by that process. Such a restraint is necessary to protect the other party, and does not unduly prejudice the public. In speaking of such a contract, it was said by the New York court, in a late case, that it "simply left matters substantially as they were

²⁴² *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37; *Rakestraw v. Lanier*, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154.

²⁴³ *Mandeville v. Harman*, 42 N. J. Eq. 185, 7 Atl. 37.

²⁴⁴ *French v. Parker*, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733. To the same effect, see *Butler v. Burleson*, 16 Vt. 176; *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Linn v. Sigsbee*, 67 Ill. 75; *McClurg's Appeal*, 58 Pa. 51; *Miller v. Elliott*, 1 Ind. 484, 50 Am. Dec. 475; *Cook v. Johnson*, 47 Conn. 175, 36 Am. Rep. 64; *Doty v. Martin*, 32 Mich. 462; *Timmerman v. Dever*, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 210; *Cole v. Edwards*, 93 Iowa, 477, 61 N. W. 940; *McCurry v. Gibson*, 108 Ala. 451, 18 South. 806, 54 Am. St. Rep. 177; *Tillinghast v. Boothby*, 20 R. I. 59, 37 Atl. 344. Agreement never to practice law in a particular town. *Smalley v. Greene*, 52 Iowa, 241, 3 N. W. 78, 35 Am. Rep. 267; *Bunn v. Guy*, 4 East, 190.

before the sale, except that the seller of the secret had agreed that she would not destroy its value after she had received full value for it. The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what he paid for. It imposed no restriction upon either that was not beneficial to the other by enhancing the price to the seller, or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory." ²⁴⁵

SAME—UNLAWFUL COMBINATIONS—MONOPOLIES, TRUSTS, ETC.

170. **A combination between dealers in a necessary commodity to control and enhance the price by preventing competition in the sale thereof, or by decreasing the production, or by withholding it from the market, or other illegitimate means, is contrary to public policy.**
171. **Combinations to prevent competition have been allowed under particular circumstances.**
172. **A combination between laborers, mechanics, and other workmen to control the price of their labor, by the weight of authority, is lawful if unlawful or unreasonable means for accomplishing the object are not contemplated, the mere fact of combination to control the price of labor not being per se illegal.**

The law does not undertake to say to a dealer in a commodity, even though it may be one of the necessities of life, that he shall not sell it above a certain price, nor to compel him to sell it at all. Singly, he may suspend sales and raise the price to suit his own interests, though it may be detrimental to the public interest. The law does, however, condemn a combination between several manufacturers or dealers in a necessary commodity, the object of which is to control

²⁴⁵ *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475 (affirming 51 Hun, 644, 4 N. Y. Supp. 402). And see *Fowle v. Park*, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427; *Vickery v. Welch*, 19 Pick. (Mass.) 523; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Jarvis v. Peck*, 10 Paige (N. Y.) 118. Condition of contract of employment that servant shall not use or divulge trade secrets is not invalid as in restraint of trade. *Thum Co. v. Tloczynski*, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200, 68 Am. St. Rep. 469; *Simmons Medicine Co. v. Simmons* (C. C.) 81 Fed. 163. Contract of employment between company using patented machines and mechanic, which requires that improvements in machines made by mechanic shall belong to company, is not unreasonable. *Hulse v. Machine Co.*, 65 Fed. 864, 13 C. C. A. 180.

and enhance the price by preventing competition in the sale thereof, or by decreasing the production, or by withholding it from the market, or other illegitimate means. "When competition is left free," it was said by the Pennsylvania court, in holding a combination between coal companies void, "individual error or folly will generally find a correction in the conduct of others. But here the companies have combined together to govern the supply and the price of coal. * * * This combination has a power in its confederated forms which no individual can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise; or, if the supply goes forward, the price fixed by the confederates must accompany it. * * * The influence of a lack of supply, or a rise in the price, of an article of such prime necessity, cannot be measured. * * * Such a combination is more than a contract; it is an offense."²⁴⁶ Such agreements as these tend to create monopolies and stifle competition. They are not only contrary to statutes which have been enacted in most jurisdictions,²⁴⁷ but are

²⁴⁶ *Morris Run Coal Co. v. Coal Co.*, 68 Pa. 173. See, also, *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Arnot v. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; *People v. Refining Co.*, 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; *Urmston v. Whitelegg*, 63 Law T. 455; *De Witt Wire-Cloth Co. v. Wire-Cloth Co.*, 16 Daly, 529, 14 N. Y. Supp. 277; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *Strait v. Harrow Co. (Sup.)* 18 N. Y. Supp. 224; *Nester v. Brewing Co.*, 161 Pa. 473, 29 Atl. 102; *State v. Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; *SANTA CLARA VALLEY MILL & LUMBER CO. v. HAYES*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728, 11 Am. St. Rep. 667; *People v. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437, 45 Am. St. Rep. 609; *Milwaukee Masons' & Builders' Ass'n v. Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612.

²⁴⁷ By Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is declared illegal; and every person who monopolizes, or attempts or combines or conspires with another to monopolize, any part of such trade or commerce is made guilty of a misdemeanor. Under this act a combination imposing restraint is unlawful, whether reasonable or unreasonable, and whether or not it actually raises prices. *United States v. Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. A contract between manufacturers of iron pipe in different states, whereby free competition was restrained, and prices determined by a committee, held unlawful. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. See, also, *United States v. E. C. Kight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L.

contrary to public policy, and void independently of any statutory prohibition.

Some combinations between dealers are legitimate, and have been sustained, though the object was, to a certain extent, to prevent competition and enhance prices.²⁴⁸ The line between combinations that are lawful and those that are unlawful is not clear, and the cases are not uniform. It has been held that an agreement between partners not to sell below a certain price is not unlawful where there is no intention to create a monopoly and control prices.²⁴⁹

The rule that combinations to prevent competition and enhance prices are illegal has been held not to apply to a combination between manufacturers of an article which is not a necessity, where the agreement puts no restraint on the production and sale of the article. In a Massachusetts case several rival manufacturers and sellers of a certain fixture, under patents owned by them, who were the principal dealers in the article, and substantially supplied the market with it, entered into a combination to prevent competition between them, and it was upheld. "In effect," it was said, "it is an agreement, between three makers of a commodity, that for three years they will sell it at a uniform price fixed at the outset, and to be changed only by consent of a majority of them. The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market, but to a particular curtain fixture of the parties' own manufacture. It does not look to affecting competition from outside (the parties have a monopoly by their patents), but only to restrict competition in price between themselves. Even if such an agreement tends to raise the price of the commodity, it is one which the parties have a right to make. To hold otherwise would be to impair the right of persons to make contracts and to put a price on the products of their own industry. But we cannot assume that the purpose and effect of the combination are to unduly raise the price of the commodity. A natural purpose and a natural effect are to maintain a fair and uniform price, and to prevent the injurious effects, both to producers and customers, of fluctuating prices caused by undue competition. When it appears that the combination is used to the public detriment, a different question will be presented from that now before us. The contract is apparently beneficial to the parties to the combination, and not necessarily injurious to the public, and we know of no authority or reason

Ed. 290; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 399; *United States v. Northern Securities Co.* (C. C.) 120 Fed. 721. There are statutes declaring contracts and combinations in restraint of trade unlawful in many of the states. The subject is beyond the scope of this book.

²⁴⁸ See *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319.

²⁴⁹ *Marsh v. Russell*, 66 N. Y. 288.

for holding it to be invalid, as in restraint of trade or against public policy.”²⁵⁰ On the other hand, many cases hold that any combination among manufacturers to create a monopoly to control the price of a useful article or commodity, although not a prime necessity, is illegal.²⁵¹

“Corners” in the Market.

There are few combinations more clearly contrary to public policy than agreements to create what are known as “corners” in the market, as where several persons enter into a combination to buy up more of a commodity than there is in the market, so as to force a fictitious and unnatural rise in values, with a view of taking advantage of dealers and purchasers whose necessities compel them to buy.²⁵² A combination to create a corner in one of the necessities of life is not only illegal, but is criminal. A combination to acquire a controlling interest in the stock of a corporation for the purpose of creating a corner in the stock market, though probably not criminal, is at least illegal.²⁵³

Monopolies under Patents.

The rule against contracts in restraint of trade and monopolies does not apply to contracts in reference to the production and sale of a patented article. It is the purpose of a patent to give the inventor a monopoly. It is a monopoly authorized by the government. In upholding an agreement by a patentee to allow an association and its members

²⁵⁰ CENTRAL SHADE ROLLER CO. v. CUSHMAN, 143 Mass. 353, 9 N. E. 629. And see Dolph v. Machinery Co. (C. C.) 28 Fed. 553; Skrainka v. Scharringhausen, 8 Mo. App. 522; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612. A contract by which three of four companies engaged in the manufacture of oleomargarine consolidate as a corporation, for the purpose of stopping the sharp competition between them, and agree that none shall separately engage in the business for five years, held not invalid as creating a monopoly. Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784. There can be no monopoly in anything but property, and news is not a subject of property until published and copyrighted, and hence a corporation engaged in gathering and transmitting news for publication cannot be compelled to furnish to a newspaper the same service extended to others. State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368. Contra, Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184.

²⁵¹ EMERY v. CANDLE CO., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819 (candles); Cummings v. Stone Co., 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655 (Hudson river bluestone); Cohen v. Envelope Co., 166 N. Y. 292, 59 N. E. 906 (envelopes); Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125 (ice).

²⁵² Wright v. Crabbs, 78 Ind. 487; Raymond v. Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499.

²⁵³ Sampson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327.

the exclusive use and sale of inventions patented by him, it was said: "The owner does not possess his patent upon the condition that he shall make or vend the article patented, or allow others to do so for a fair and reasonable compensation. * * * Considerations which might obtain if the agreement were in regard to other articles cannot be of any weight in the decision of the questions arising upon an agreement as to patented articles."²⁵⁴ Patents, however, confer no right upon the owners of several distinct patents to combine for the purpose of restraining competition and trade, and such a combination is unlawful.²⁵⁵

Combinations between Laborers, Mechanics, and Other Workmen.

If dealers cannot combine to stifle competition and control the price of a commodity, it may seem reasonable to suppose that workmen cannot combine to control the price of their labor. Authority for declaring that the same principle applies is not wanting. In an Illinois case, a large number of the law stenographers of Chicago formed an association, and fixed a schedule of prices which should be binding on them. The court held that it was contrary to public policy and illegal, citing, in support of the judgment, cases in which dealers in commodities and proprietors of boats had combined for a similar purpose. "All of the members of the association," it was said, "are engaged in the same business within the same territory, and the object of the association is purely and simply to silence and stifle all competition as between its members. No equitable reason for such restraint exists, the only reason put forward being that, under the influence of competition as it existed prior to the organization of the association, prices for stenographic work had been reduced too far, and the association was organized for the purpose of putting an end to all competition, at least as between those who could be induced to become members. True, the restraint is not so far-reaching as it would have been if all the stenographers in the city had joined the association, but, so far as it goes, it is precisely of the same character, produces the same results, and is subject to the same legal objection."²⁵⁶

²⁵⁴ *Good v. Daland*, 121 N. Y. 1. 24 N. E. 15. And see *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Bowling v. Taylor* (C. C.) 40 Fed. 404; *Gloucester Isinglass & Glue Co. v. Cement Co.*, 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563. 26 Am. St. Rep. 214; *Printing & Numerical Reg. Co. v. Sampson*, L. R. 19 Eq. 462; *GARST v. HARRIS*, 177 Mass. 72, 58 N. E. 174; ante, p. 314.

²⁵⁵ A combination among manufacturers of harrows, by which each assigns to a corporation patents under which he is operating, and takes back an exclusive license to make and sell the same style of harrow previously made by him, and no other, all to sell at uniform prices, held to be unlawful. *National Harrow Co. v. Hench* (C. C.) 76 Fed. 667; *Id.*, 83 Fed. 36, 27 C. C. A. 349, 39 L. R. A. 299. See, also, *National Harrow Co. v. Quick* (C. C.) 67 Fed. 130; *Strait v. Harrow Co.* (Sup.) 18 N. Y. Supp. 224.

²⁵⁶ *MORE v. BENNETT*, 140 Ill. 69, 29 N. E. 888, 15 L. R. A. 361, 33 Am. St. Rep. 216.

By most courts, however, it is held that combinations between laborers, mechanics, or other workmen are valid, even though the object be to prevent competition and maintain prices, provided the provisions for that purpose are reasonable.²⁵⁷ *Greenhood*²⁵⁸ lays down the rule (no doubt established by the weight of authority) that "combinations of artisans for their common benefit, as for the development of skill in their trade, or to prevent overcrowding therein,²⁵⁹ or to encourage those belonging to their trade to enter their fold,²⁶⁰ or for the purpose of raising the prices of labor,²⁶¹ are valid, provided no force or other unlawful means be employed to carry out their ends,²⁶² or their object be not to impoverish third persons,²⁶³ or to extort money from employers,²⁶⁴ or to encourage strikes or breaches of contract,²⁶⁵ or to restrict the freedom of members for the purpose of compelling employers to conform to their rules."²⁶⁶

²⁵⁷ *COLLINS v. LOCKE*, 4 App. Cas. 674.

²⁵⁸ *Greenh. Pub. Pol.* rule 546.

²⁵⁹ *Snow v. Wheeler*, 113 Mass. 179.

²⁶⁰ *Com. v. Hunt*, 4 Metc. (Mass.) 111, 38 Am. Dec. 346. In this case a rule of an association forbade its members to work for any one who should employ nonunion members, and yet the combination was held not illegal. This, however, was a criminal prosecution, and this fact may be important. Many acts and objects render a contract illegal as being contrary to public policy which would not render the parties liable to a criminal prosecution. See *Greenh. Pub. Pol.* 648, note 2.

²⁶¹ *COLLINS v. LOCKE*, 4 App. Cas. 674; *Master Stevedore's Ass'n v. Walsh*, 2 Daly (N. Y.) 1; *Herriman v. Menzies*, 115 Cal. 16, 46 Pac. 730, 35 L. R. A. 318, 56 Am. St. Rep. 81. But see *People v. Fisher*, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501.

²⁶² *Reg. v. Rowlands*, 17 Adol. & E. 671; *CAREW v. RUTHERFORD*, 106 Mass. 1, 8 Am. Rep. 287; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; *Old Dominion S. S. Co. v. McKenna* (C. C.) 30 Fed. 48.

²⁶³ *People v. Fisher*, 14 Wend. (N. Y.) 9; *Rigby v. Connol*, 14 Ch. Div. 482; *Hornby v. Close*, L. R. 2 Q. B. 153.

²⁶⁴ *CAREW v. RUTHERFORD*, 106 Mass. 1, 8 Am. Rep. 287.

²⁶⁵ *Hornby v. Close*, L. R. 2 Q. B. 153; *Farrer v. Close*, L. R. 4 Q. B. 602; *Old Dominion S. S. Co. v. McKenna* (C. C.) 30 Fed. 48.

²⁶⁶ A provision in a contract between stevedores that unless the merchants in particular cases employ one of the contracting parties to whom, as between themselves, the business is assigned by the contract, none of them will accept the employment, is bad. *COLLINS v. LOCKE*, 4 App. Cas. 674. A contract between a brewers' association and a labor union, providing that no employé of the former shall work more than four weeks without becoming a member of the latter, is void. *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496. A liverymen's association, which prohibits any member from doing business with any person who does not patronize its members exclusively, or from letting a hearse to a person for a funeral where the undertaker patronizes nonunion members, is illegal. *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1. By-laws of a builders' association, which require members to pay to

Combinations between Employers.

In England a contract between employers for the purpose of protecting their interests against combinations of workmen, by which they agree to regulate wages and hours of work, or wholly or partially to suspend work for a time, as the majority may resolve, has been held in restraint of trade, as depriving each of the control of his own business, and therefore not enforceable.²⁶⁷ In Pennsylvania, on the other hand, it has been held that where employes enter into a combination, which under the statutes of the state is lawful, to control by artificial means the supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is lawful, since it is not made to lower the price of labor as regulated by supply and demand.²⁶⁸

SAME—EXEMPTING FROM LIABILITY FOR NEGLIGENCE.

- 173. A stipulation, in a contract between master and servant, that the master shall not be liable for injuries to the servant caused by the negligence of the master, or by the negligence of superior servants for which the law makes the master liable, is contrary to public policy.**
- 174. The same is true of a stipulation in a contract with a common carrier, either of goods or passengers, exempting it from liability for losses or injuries caused by its negligence.**
- 175. The same is true, in some jurisdictions, of a stipulation by a telegraph company exempting it from liability for error, delay, or nondelivery; but as to this there is a direct conflict of opinion.**

According to the better opinion, a master cannot, by stipulation in the contract with his servant, exempt himself from liability for injuries to the servant caused by his negligence. Such a stipulation is void as being contrary to public policy.²⁶⁹ It has also been held that, since the

the association 6 per cent. on all contracts taken by them, and to submit all bids first to the association, and provide that the lowest bidder shall add 6 per cent. to his bid before it is submitted to the owner, are void. *Milwaukee Masons' & Builders' Ass'n v. Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97. To same effect, *Bailey v. Association*, 103 Tenn. 99, 52 S. W. 652, 46 L. R. A. 561.

²⁶⁷ *Hilton v. Eckersley*, 6 El. & Bl. 47, 66.

²⁶⁸ *Cote v. Murphy*, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686. "The moment the legislature relieves one," said the court, "and by far the larger number, of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, down went the foundation on which common-law conspiracy was based as to that particular subject."

²⁶⁹ *Runt v. Herring*, 2 Misc. Rep. 105, 21 N. Y. Supp. 244, and cases there

liability imposed upon a railroad company by law for injuries to their servants caused by the carelessness of those who are superior in authority and control over them is based upon considerations of public policy, for this reason a railroad company cannot stipulate with its employes, at the time and as a part of their contract of employment, that such liability shall not attach to it. "Such liability is not created for the protection of the employes simply, but has its reason and foundation in a public necessity and policy, which should not be asked to yield or surrender to mere private interests and agreements."²⁷⁰

A railroad company, shipowner, or other common carrier cannot, by stipulation in contracts of carriage, exempt itself from liability, or limit its liability, for injury to passengers or goods caused by its own negligence or the negligence of its servants. Such a stipulation is, in this country at least, regarded as contrary to public policy.²⁷¹ It may, however, exempt itself from losses or injuries occurring from other causes than its own negligence, as from accident, and for which it would be liable as an insurer.²⁷²

cited; *Louisville & N. R. Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 South. 276; *Roesner v. Hermann* (C. C.) 8 Fed. 782. See *Purdy v. Railroad Co.*, 125 N. Y. 209, 26 N. E. 255, 21 Am. St. Rep. 736. Where an employe joins a relief association to which he contributes, and his employer guaranties the obligations, etc., the employe's agreement in his application for membership that acceptance of benefits from the association for an injury shall release the company from damages is not void as against public policy, since he has the right of election to accept benefits or sue. *Otis v. Pennsylvania Co.* (C. C.) 71 Fed. 136; *Maine v. Railroad Co.*, 109 Iowa, 260, 70 N. W. 630; *Pittsburg, C., C. & St. L. Ry. Co. v. Cox*, 55 Ohio, 497, 45 N. E. 641, 35 L. R. A. 507; *Eckman v. Railroad Co.*, 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; *Pittsburg, C., C. & St. L. Ry. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; *Hamilton v. Railroad Co.* (C. C.) 118 Fed. 92.

²⁷⁰ *Lake Shore & M. S. Ry. Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833; *Johnson's Adm'x v. Railroad Co.*, 86 Va. 975, 11 S. E. 829; *Hissong v. Railroad Co.*, 91 Ala. 514, 8 South. 776. Contra, *Western & A. R. Co. v. Bishop*, 50 Ga. 465 (holding such a contract valid so far as it does not waive any criminal neglect of the company or its principal officers; but this case expressly declares that contracts contravening public policy will not be enforced).

²⁷¹ *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Armstrong v. Express Co.*, 159 Pa. 640, 28 Atl. 448; *Abrams v. Railway Co.*, 87 Wis. 485, 58 N. W. 780, 41 Am. St. Rep. 55; *Schulze-Berge v. The Guildhall* (D. C.) 58 Fed. 796; *Monroe v. The Iowa* (D. C.) 50 Fed. 561; *Johnson v. Railway Co.*, 69 Miss. 191, 11 South. 104, 30 Am. St. Rep. 534; *Louisville & N. R. Co. v. Grant*, 99 Ala. 325, 13 South. 599; *Gulf, C. & S. F. R. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177, 18 S. W. 266, 30 Am. St. Rep. 871; *Union Pac. Ry. Co. v. Rainey*, 19 Colo. 225, 34 Pac. 986; *The Hugo* (D. C.) 57 Fed. 403; *Atebison. T. & S. F. R. Co. v. Lawler*, 40 Neb. 356, 58 N. W. 968; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335.

²⁷² *Indianapolis, D. & W. R. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E.

As to the validity of stipulations in contracts with telegraph companies for the transmission of messages, there is a direct conflict. Many cases hold that a stipulation providing that the liability of the company for any mistake or delay in the transmission and delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and not against public policy, except in so far as it would exempt the company from liability for willful misconduct or gross negligence.²⁷³ Another class of cases holds that there can be no consideration for such a stipulation on the part of the sender of the message, and, furthermore, that it is contrary to public policy.²⁷⁴ Still another class of cases, while upholding such a stipulation in part, hold

1138; *Davis v. Railroad Co.*, 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; *Hartford Fire Ins. Co. v. Railroad Co.*, 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84. It may limit its liability to injuries received on its own line, *Texas & P. Ry. Co. v. Smith* (Tex. Civ. App.) 24 S. W. 365; *Galveston, H. & S. A. R. Co. v. Short* (Tex. Civ. App.) 25 S. W. 142; *McCann v. Eddy* (Mo. Sup.) 27 S. W. 541; *McEacheran v. Railroad Co.*, 101 Mich. 264, 59 N. W. 612; *Coles v. Railroad Co.*, 41 Ill. App. 607; *Dunbar v. Railway Co.*, 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860; but not when it is a partner with the connecting line, *Gulf, C. & S. F. R. Co. v. Wilbanks*, 7 Tex. Civ. App. 489, 27 S. W. 302. It may exempt itself from liability after unloading, where it provides a covered warehouse into which the cargo is discharged, and the time and place of discharge are easily ascertainable by the consignees. *Constable v. Steamship Co.*, 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903. Express messenger, accompanying express car in pursuance of contract between railroad company and express company, held not a passenger, and cannot recover from railroad company for injuries in collision where contract between companies exempts from such liability and his own contract of employment assumes such risk. *Baltimore & O. S. W. R. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560.

²⁷³ *Riley v. Telegraph Co.*, 6 Misc. Rep. 221, 26 N. Y. Supp. 532; *Primrose v. Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Grinnell v. Telegraph Co.*, 113 Mass. 299, 18 Am. Rep. 485; *Western Union Telegraph Co. v. Carew*, 15 Mich. 525; *Camp v. Telegraph Co.*, 1 Metc. (Ky.) 164, 71 Am. Dec. 461; *Breese v. Telegraph Co.*, 48 N. Y. 132, 8 Am. Rep. 526; *Passmore v. Telegraph Co.*, 78 Pa. 238; *Western Union Telegraph Co. v. Blanchard*, 68 Ga. 299 (45 Am. Rep. 486, note, collecting cases); *Coit v. Telegraph Co.*, 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153.

²⁷⁴ *Brown v. Telegraph Co.*, 111 N. C. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793; *Tyler v. Telegraph Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Union Telegraph Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Wertz v. Telegraph Co.*, 8 Utah, 499, 33 Pac. 136; *Western Union Telegraph Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58; *Western Union Telegraph Co. v. Cook*, 61 Fed. 624, 9 C. C. A. 680; *Candee v. Telegraph Co.*, 34 Wis. 477, 17 Am. Rep. 452; *Bartlett v. Same*, 62 Me. 218, 16 Am. Rep. 437; *Western Union Telegraph Co. v. Chamblee*, 122 Ala. 428, 25 South. 232, 82 Am. St. Rep. 89.

that it cannot exonerate the company from liability for damages caused by defective instruments, or a want of skill or ordinary care on the part of its operators.²⁷⁵

EFFECT OF ILLEGALITY.

We come now to the second branch of the subject of illegality in contract,—its effect upon the validity of a contract. The effect of illegality upon the validity of contracts in which it appears varies according to the circumstances. It may affect the whole, or only a part, of a contract, and the legal and illegal parts may or not be capable of separation. The direct object of a contract may be the doing of an illegal act, or the direct object may be innocent, though the contract is designed to further an illegal purpose. The parties may both be ignorant, or both be aware, of the illegality which remotely or directly affects the transaction; or one may be innocent of the objects intended by the other. Securities may be given for money due upon, or money advanced for, an illegal transaction, and the validity of such securities depends upon various considerations. Finally, though the contract is illegal, certain considerations may require that some relief be granted to one of the parties, notwithstanding his fault. This is a very complex and difficult branch of the law, and on some of the questions suggested there is a conflict of opinion. All we can do is to state the general principles which govern, and call attention to those points on which there is a conflict.²⁷⁶

SAME—AGREEMENTS PARTLY ILLEGAL.

- 176. Where an agreement is illegal in part only, the part which is good may be enforced, provided it can be separated from the part which is bad, but not otherwise. In detail:**
- (a) **An indivisible promise to do several acts, some of which are illegal, or a single promise to do a legal act, based on several considerations, one of which is illegal, is wholly void.**
 - (b) **But where distinct promises, some of which are good, are based on a good consideration, or where there are distinct promises based on several distinct considerations, some of which are good, the good promises, or promises based on good considerations, may be enforced.**

An agreement may consist of a single promise based on a single consideration. If either the promise or the consideration is illegal, there is no difficulty in pronouncing the agreement void.²⁷⁷ On the other

²⁷⁵ *Sweatland v. Telegraph Co.*, 27 Iowa, 433, 1 Am. Rep. 285.

²⁷⁶ *Anson, Cont.* (4th Ed.) 189.

²⁷⁷ *Dennehy v. McNulta*, 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609.

hand, there may be several promises or considerations, some of which only are illegal, and in these cases the agreement may or may not be wholly void, according to the circumstances. Whether it is wholly void or not will depend upon whether it is one entire and indivisible agreement, or whether it is divisible, so that the good may be separated from the bad. "If any part of an agreement is valid, it will avail pro tanto, though another part of it may be prohibited by statute; provided the statute does not, either expressly or by necessary implication, render the whole void; and provided, furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant."²⁷⁸ "If the part which is good depends upon that which is bad, the whole is void; and so I take the rule to be if any part of the consideration be malum in se, or the good and void consideration be so mixed, or the contract so entire, that there can be no apportionment."²⁷⁹

At one time a distinction was made in the application of this principle between illegality by reason of a statute and illegality at common law. The judges, fearing that statutes might be eluded, laid it down that "the statute is like a tyrant,—where he comes he makes all void; but the common law is like a nursing father,—makes only void that part where the fault is, and preserves the rest." Such a distinction, however, is no longer recognized.²⁸⁰

The above are the general rules, but it will aid us in understanding the doctrine if we state the law more in detail.

Same—Indivisible Agreements.

If a promise to do several acts is indivisible, and is in part illegal, it cannot be enforced as to that part which is legal, but the whole agreement is void.²⁸¹ This rule is too clear to need explanation. The only difficulty is in determining whether the promise is divisible; but this is a question of interpretation of contracts.

Where the agreement consists of one promise made upon several

²⁷⁸ *Rand v. Mather*, 11 Cush. (Mass.) 1, 59 Am. Dec. 131, overruling *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *BIXBY v. MOOR*, 51 N. H. 402.

²⁷⁹ 2 Kent, Comm. 467; *U. S. v. Bradley*, 10 Pet. 343, 9 L. Ed. 448; *HANDY v. PUBLISHING CO.*, 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211.

²⁸⁰ *Anson*, Cont. (4th Ed.) 189; *Pickering v. Railway Co.*, L. R. 3 C. P. 250; *State v. Findley*, 10 Ohio, 51; *Rand v. Mather*, 11 Cush. (Mass.) 1, 59 Am. Dec. 131; *U. S. v. Bradley*, 10 Pet. 343, 9 L. Ed. 448; *Hynds v. Hays*, 25 Ind. 31.

²⁸¹ *Crawford v. Morrell*, 8 Johns. (N. Y.) 253; *Thayer v. Rock*, 13 Wend. (N. Y.) 53; *Leavitt v. Palmer*, 3 N. Y. 19, 51 Am. Dec. 333; *McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; *Foote v. Nickerson*, 70 N. H. 496, 48 Atl. 1088, 54 L. R. A. 554; *Union Cent. Life Ins. Co. v. Berlin*, 90 Fed. 779, 33 O. C. A. 274.

considerations, some of which are bad and some good, here, also, the promise is wholly void, for it is impossible to say whether the legal or the illegal portion of the consideration most affected the mind of the promisor, and induced his promise.²⁸² An illustration of this rule is in the case of sales of goods, some of which it is illegal to sell. Where each article is sold for a separate price, the price of those articles which it was lawful to sell may be recovered.²⁸³ If, however, a note is given for the price of all the articles, there can be no recovery at all on it, for it is based in part on an illegal consideration.²⁸⁴

The consideration, to bring a case within this principle, must be illegal and not merely void. If part of the consideration is merely void, and there is still a valid consideration left, it will support the promise, for, as we have seen, the law does not undertake to determine whether the consideration is adequate. It is only where part of the consideration is illegal that it taints the entire agreement.²⁸⁵

²⁸² *FEATHERSTON v. HUTCHINSON*, Cro. Eliz. 199; *TRIST v. CHILD*, 21 Wall. 441, 22 L. Ed. 623; *State v. Board*, 35 Ohio St., at page 519; *BIXBY v. MOOR*, 51 N. H. 402; *Wisner v. Bardwell*, 38 Mich. 278; *Saratoga County Bank v. King*, 44 N. Y. 87; *Bredin's Appeal*, 92 Pa. 241, 37 Am. Rep. 677; *Sumner v. Summers*, 54 Mo. 340; *Perkins v. Cummings*, 2 Gray (Mass.) 258; *BISHOP v. PALMER*, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; *McQuade v. Rosecrans*, 36 Ohio St. 442; *Tobey v. Robinson*, 99 Ill. 222; *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151; *Ricketts v. Harvey*, 106 Ind. 564, 6 N. E. 325; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; *Pettit's Adm'r v. Pettit's Distributees*, 32 Ala. 288; *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Chandler v. Johnson*, 39 Ga. 85; *Gage v. Fisher*, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557; *Edwards Co. v. Jennings*, 89 Tex. 618, 35 S. W. 1053; *Geer v. Frank*, 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110. But see *Pierce v. Pierce*, 17 Ind. App. 107, 46 N. E. 480; *FISHELL v. GRAY*, 60 N. J. Law, 5, 37 Atl. 606; *Rosenbaum v. Credit System Co.*, 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449; *KING v. KING*, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635. Thus, in Kansas, it is held that a chattel mortgage is entirely void if illegal as to one of the articles mortgaged (intoxicating liquors). *Gerlach v. Skinner*, 34 Kan. 86, 8 Pac. 257, 55 Am. Rep. 240; *Flersheim v. Cary*, 39 Kan. 178, 17 Pac. 825. No recovery, for instance, can be had on the quantum meruit for services rendered in the grocery part of the business under a contract to work for agreed wages as bartender and clerk for a dealer in groceries and liquors, the sale of the latter being prohibited. *Sullivan v. Horgan*, 17 R. I. 109, 20 Atl. 232, 9 L. R. A. 110. A note, in consideration of both past and future cohabitation, is void in toto. *Massey v. Wallace*, 32 S. C. 149, 10 S. E. 937.

²⁸³ Post, p. 324, note 287.

²⁸⁴ *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Kidder v. Blake*, 45 N. H. 530; *Allen v. Pearce*, 84 Ga. 606, 10 S. E. 1015; *Braitche v. Guelick*, 37 Iowa, 212; *Cotten v. McKenzie*, 57 Miss. 418; *Oakes v. Merrifield*, 93 Me. 297, 45 Atl. 31. But see *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837; *Wilcox v. Daniels*, 15 R. I. 261, 3 Atl. 204.

²⁸⁵ *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; ante, p. 112. See, also, *Rosenbaum v. Credit Sys-*

Same—Divisible Agreements.

Where an agreement consists of several promises based upon several considerations, the fact that one or more of the considerations is illegal will not avoid all the promises, if those which are based upon legal considerations are severable from the others.²⁸⁶ Thus, in the case of the sale of various articles, some of which it is illegal to sell, if each article is sold for a separate price, so that the consideration is apportionable, the price of those which it was lawful to sell may be recovered.²⁸⁷

Again, if there are several promises, made for a lawful consideration, some of which are legal and some illegal, the legal promises may be enforced.²⁸⁸ At an early day it was declared "that if some of the covenants of an indenture or the conditions indorsed upon a bond are against law, and some are good and lawful; that in this case the covenants or conditions which are against law are void ab initio, and the others stand good."²⁸⁹ In other words, a lawful promise, made upon a lawful consideration, is not invalid merely because an unlawful promise was made at the same time and for the same consideration.²⁹⁰ This principle is frequently applied to contracts in restraint of trade. An agreement, for instance, not to engage in business at a certain place, or any other place, though void as to the general restriction, may be enforced as to the partial restriction, provided the restriction is so worded as to be divisible.²⁹¹

tem Co., 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449; *KING v. KING*, 63 Ohio St. 363, 59 N. E. 111, 52 L. R. A. 157, 81 Am. St. Rep. 635.

²⁸⁶ *Robinson v. Green*, 3 Metc. (Mass.) 159.

²⁸⁷ Ante. p. 323, note 284. See *Carleton v. Woods*, 28 N. H. 290; *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837; *Walker v. Lovell*, 28 N. H. 138, 61 Am. Dec. 605; *Boyd v. Eaton*, 44 Me. 51, 69 Am. Dec. 83; *Chase's Ex'rs v. Burkholder*, 18 Pa. 48. If a sale of a number of articles is for a gross price, the contract is indivisible, and, if a sale of some is prohibited, none of the price can be recovered. *Ladd v. Dillingham*, 34 Me. 316. And see *Holt v. O'Brien*, 15 Gray (Mass.) 311.

²⁸⁸ *Bank of Australia v. Breillat*, 6 Moore, P. C. 152, 201; *U. S. v. Bradley*, 10 Pet. 343, 9 L. Ed. 448; *State v. Board*, 35 Ohio St. 519; *State v. Findley*, 10 Ohio, 51; *Union Locomotive & Express Co. v. Railway Co.*, 35 N. J. Law, 240; *Stewart v. Railway Co.*, 38 N. J. Law, at page 520; *Presbury v. Fisher*, 18 Mo. 50; *Gelpeke v. City of Dubuque*, 1 Wall. 175, 17 L. Ed. 520; *Pennsylvania Co. v. Wentz*, 37 Ohio St. 333; *Ware v. Curry*, 67 Ala. 274; *U. S. v. Hodgson*, 10 Wall. 395, 19 L. Ed. 937; *U. S. v. Mora*, 97 U. S. 413, 24 L. Ed. 1013. Contra, *LINDSAY v. SMITH*, 78 N. C. 328, 24 Am. Rep. 463.

²⁸⁹ *PIGOT'S CASE*, 11 Co. Rep. 27b.

²⁹⁰ *Pollock*, Cont. (3d Ed.) 337.

²⁹¹ *Peltz v. Nichols*, 62 Mo. 171; *Dean v. Emerson*, 102 Mass. 480; *Mallon v. May*, 11 Mees. & W. 653; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Thomas v. Miles' Adm'r*, 3 Ohio St. 275; *Davies v. Lowen*, 64 Law T. 655; *Haynes v. Dorman* [1849] 2 Ch. 13; *Smith's Appeal*, 113 Pa. 579, 6 Atl. 251; *Rosenbaum v. Credit System Co.*, 65 N. J. Law, 255, 48 Atl. 237, 53 L. R. A. 449. Contra, *More v. Bonnet*, 40 Cal. 251, 6 Am. Rep. 621. A

Illustrations of this rule are also found in cases where a corporation has entered into an agreement, some parts of which are ultra vires, and so, in a sense, unlawful. It is held in such cases that, "where you cannot sever the illegal from the legal part, * * * the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."²⁹² These cases serve as an illustration, but it must be remembered that agreements of this nature are invalidated not so much by the illegality of their objects as by the incapacity of the corporation to bind itself.²⁹³

SAME-OBJECT UNLAWFUL BUT INTENTION INNOCENT.

177. Where the direct object is illegal, the agreement is void, though the parties did not know of the illegality, since ignorance of law is no excuse.

178. EXCEPTIONS—This rule does not apply

- (a) **Where the agreement can be, and is, legally performed in a way not originally contemplated, if there was no intention to break the law.**
- (b) **Where a party performs his part in ignorance of a fact which renders performance illegal, and which he is not bound to know.**

Where the direct object of the parties is to do an illegal act, the agreement is void. In such a case it is immaterial that they did not know their object was illegal, for ignorance of law is no excuse.²⁹⁴ A contract, for instance, in violation of a statute, cannot be sustained on the ground that the parties did not know of the existence of the statute.

Ignorance of illegality, however, may become important if the contract admits of being performed, and is in fact performed, in a legal manner, though a detail in the performance as originally contemplated by the parties would, unknown to them, have directly resulted in a breach of the law. In a leading case on this point the defendant had chartered the plaintiff's ship to take a cargo of hay from a port in France to London, the cargo to be taken from the ship alongside and landed at a certain wharf. Unknown to the parties an order in council

contract by which one formerly dealing in oil in the city of H. agreed not to prosecute such business within the state, the city of I. excepted, for five years, is not divisible, and, being void as to the restriction within the state, is void as to the restriction in the city of H. *Consumers' Oil Co. v. Numemaker*, 142 Ind. 560, 41 N. E. 1048, 51 Am. St. Rep. 193.

²⁹² *Pickering v. Railway*, L. R. 3 C. P. 250; *State v. Board*, 35 Ohio St. 519.

²⁹³ *Ashbury Carriage Co. v. Riche*, L. R. 7 H. L. 653. See Anson, *Cont.* (8th Ed.) 207.

²⁹⁴ *Favor v. Philbrick*, 7 N. H. 326; *Rosenbaum v. Credit System Co.*, 64 N. J. Law, 34, 44 Atl. 966.

had forbidden the landing of French hay. The defendant on learning this, instead of landing the cargo, took it from alongside the ship in the Thames into another ship, and exported it. In an action by the plaintiff for delay of his vessel the defendant set up the unlawful intention as avoiding the contract, but without success. "We quite agree," it was said by the court, "that where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. But we think that, in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance."²⁹⁵

Mistake of Fact.

Though mistake of law does not excuse, it is otherwise in case of mistake of fact.²⁹⁶ A father, for instance, may recover for services performed by his minor son, in unlawfully selling intoxicating liquors if he did not know the character of the services while his son was performing them. In reference to the defense of illegality in such a case it was said: "This defense is founded on a well-settled rule of law, that the law will not lend its aid to carry into effect any agreement made for the purpose of accomplishing things expressly prohibited by law. * * * The only question is whether it applies to this case. If the plaintiff did not place his son in the service of the defendant for the purpose of selling liquor illegally, more especially if he did not consent to it or know of it, then he is chargeable with no violation of law; and being, by the general rule of law, entitled to compensation for the services of his son, the defense is not maintained."²⁹⁷

So, also, it has been held that an actor may maintain an action for his services in an unlicensed theatrical exhibition, unless it appears that he knew that his employer had no license. As said in such a case: "It is ignorance of a fact, and not of the law, that saves the plaintiff's case. He undoubtedly knew, or was bound to know, that unlicensed theatrical exhibitions were unlawful; but he was not bound to know that the defendants had no license, and were doing unlawful acts."²⁹⁸

²⁹⁵ *WAUGH v. MORRIS*, L. R. 8 Q. B. 202. See *FOX v. ROGERS*, 171 Mass. 546, 50 N. E. 1041.

²⁹⁶ Clark, Cr. Law (2d Ed.) 82.

²⁹⁷ *Emery v. Kempton*, 2 Gray (Mass.) 257. If, however, an agent sells liquor, for instance, knowing it is to be retailed in violation of law, his principal is charged with such knowledge. *Fishel v. Bennett*, 56 Conn. 40, 12 Atl. 102.

²⁹⁸ *Roy v. Johnson*, 7 Gray (Mass.) 162 (cf. *STEWART v. THAYER*, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407). And see *BLOXSOME v. WILLIAMS*, 3 Barn. & C. 232; *Miller v. Hirschberg* (Or.) 37 Pac. 85. As illustrating this principle may also be mentioned bonds given to indemnify

SAME—OBJECT INNOCENT BUT INTENTION UNLAWFUL.

- 179.** Where the direct object of an agreement is innocent in itself, but the intention of both parties is unlawful, the agreement is void.
- 180.** Where the direct object of the agreement is innocent, but the intention of one of the parties is unlawful, as where goods are bought or money borrowed to be used for an unlawful purpose, the fact that the other party knows of such purpose does not render the agreement illegal, unless
- (a) He shares in the unlawful intention.
 - (b) Or does some act in aid or furtherance of the other's unlawful design.
 - (c) Or where the intention is to commit a crime which is not merely *malum prohibitum* or of inferior criminality.
- 181.** If the direct object of the agreement is innocent, and there is an unlawful intention on one side only, of which the other party is ignorant, the latter is entitled to full benefits under the agreement, or, while the agreement is still executory, he may avoid it.

The English Rule.

In England it is held that, where the direct object of a contract is innocent in itself, but one of the parties has in contemplation an unlawful purpose, the contract is void if both parties knew of the illegal purpose at the time the contract was entered into; that, though there is nothing illegal in a loan of money or a sale of goods, still, if it is known by the lender or seller that the other party intends to use the money or the goods for an illegal purpose, neither the money lent, nor the goods supplied, can form the subject of an action; that the whole transaction is void. Thus, where the plaintiff supplied a brougham to a prostitute, it was held not necessary to show that he expected to be paid from the proceeds of her calling; that his knowledge of her calling justified the jury in inferring knowledge of her purpose; and that this knowledge rendered the contract void. "My difficulty was," said Bramwell, B., "whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense it was not for the same purpose. If a man were to ask for duel-

an officer or private person assisting him against liability for seizing goods under attachment, or for arresting a person. If the officer knows the seizure or arrest to be unlawful, the bond is illegal; but it is otherwise if he acts in good faith, and in ignorance of the illegality, as where it is in dispute whether property is subject to levy. *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Marsh v. Gold*, 2 Pick (Mass.) 285; *Ives v. Jones*, 25 N. C. 538, 40 Am. Dec. 421; *Anderson v. Farns*, 7 Blackf. (Ind.) 343; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Davis v. Tibbats*, 7 J. J. Marsh. (Ky.) 264; *McCartney v. Shepard*, 21 Mo. 573, 64 Am. Dec. 250; *Whitney v. Gammon*, 103 Iowa, 363, 72 N. W. 551.

ing pistols, and to say, 'I think I shall fight a duel tomorrow,' might not the seller answer, 'I do not want to know your purpose. I have nothing to do with it, that is your business. Mine is to sell the pistols, and I look only to the profit of the trade.' No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should feel it still but that the authority of *Cannan v. Bryce*²⁹⁹ and *McKinnell v. Robinson*³⁰⁰ concludes the matter."³⁰¹

The Rule in America.

There is some conflict in this country on this point, but the cases, on the whole, are consistent with the rule that the mere knowledge on the part of one party to a contract that the other contemplates an illegal purpose will not invalidate the contract. We can best arrive at a correct understanding of the rules established by the weight of authority in this country by taking cases of sales of goods and loans of money for illustrations, as it is generally with reference to them that the question arises. We will divide the subject accordingly, as some of the courts seem to have made a distinction between sales of goods and loans of money.

Same—Sale.

It is everywhere settled that, if it is a part of the contract under which the goods are sold that they shall be used for an unlawful purpose, then the contract is void, and the price cannot be recovered; and the same is no doubt true where goods are sold for the purpose of enabling the buyer to accomplish an unlawful purpose, for in the latter case there is an unlawful intention on the part of both parties.³⁰² Some

²⁹⁹ 3 Barn. & Ald. 179.

³⁰⁰ 3 Mees. & W. 435.

³⁰¹ *PEARCE v. BROOKS*, L. R. 1 Exch. 213. This case seems to have gone further than the cases which the court followed, which were actions brought for the recovery of money lent for an illegal object, the money being furnished for the express purpose of accomplishing that object.

³⁰² *Talmage v. Pell*, 7 N. Y. 328; *St. Louis Fair Ass'n v. Carmody*, 151 Mo. 566, 52 S. W. 365, 74 Am. St. Rep. 571. It has been held, for instance, that if liquor is sold for the express purpose of enabling the buyer to retail it in violation of law, the sale is illegal. *Kohn v. Melcher* (C. C.) 43 Fed. 641, 10 L. R. A. 439. It has also been held that if a house is knowingly leased or furniture sold to be used as or in a bawdy house, or for any other unlawful purpose, the rent or price cannot be recovered. *Dougherty v. Seymour*, 16 Colo. 289, 26 Pac. 823; *Ashbrook v. Dale*, 27 Mo. App. 649; *Ernst v. Crosby*, 140 N. Y. 364, 35 N. E. 603; *Riley v. Jordan*, 122 Mass. 231; *Edelmuth v. McGarren*, 4 Daly (N. Y.) 467; *Ralston v. Boady*, 20 Ga. 449; *Sherman v. Wilder*, 106 Mass. 537; *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418; *Chateau v. Singla*, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960. Some of the above cases come very close to the English rule. See, also, *Mound v. Barker*, 71 Vt. 253, 44 Atl. 346, 76 Am. St. Rep. 767.

cases hold that the sale is void if made "with a view to" the illegal purpose.³⁰³

It is also settled that if, in addition to a sale of goods which the vendor knows are to be used for an illegal purpose, he does some act in aid or furtherance of the unlawful design, his contract is void, and he cannot recover the price. An example of such a case is where a person who sells goods not only knows that his vendee intends to smuggle them into the country, but packs them up or marks them in a manner convenient for the purpose, with a view of their being smuggled.³⁰⁴

If the vendor of goods knows that they are to be used for the perpetration of a crime which is not merely *malum prohibitum* or of inferior criminality, even though he may not expressly stipulate that they shall be so used, and though he does nothing further than furnishing them to aid in such use, the contract of sale is illegal and void, and he

³⁰³ Webster v. Munger, 8 Gray (Mass.) 584; GRAVES v. JOHNSON, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446; Davis v. Bronson, 6 Iowa, 410. "When a sale of intoxicating liquors in another state has just so much greater approximation to a breach of the Massachusetts law as is implied in the statement that it is made with a view to such a breach it is void. Webster v. Munger, 8 Gray, 584; Orcutt v. Nelson, 1 Gray, 536, 541; Hubbell v. Flint, 13 Gray, 277, 279; Adams v. Coulliard, 102 Mass. 167, 172, 173. * * * If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale. * * * We assume that the sale would have taken place whatever the buyer had been expected to do with the goods. * * * The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. * * * If the sale is made with the desire to help him (the buyer) to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller while aware of his intent is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. It appears to us not unreasonable to draw the line as was drawn in Webster v. Munger, 8 Gray, 584, and to say that when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale, as just explained, the sale is void." GRAVES v. JOHNSON, *supra*, per Holmes, J.

³⁰⁴ TRACY v. TALMAGE, 14 N. Y. 162, 67 Am. Dec. 132; Waymell v. Reed, 5 Term R. 599; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; Arnot v. Coal Co., 68 N. Y. 566, 23 Am. Rep. 190; Foster v. Thurston, 11 Cush. (Mass.) 322; Skiff v. Johnson, 57 N. H. 475; Bancho v. Mansel, 47 Me. 58. Concealing and disguising form of liquor sold, in order to evade the law. AIKEN v. BLAISDELL, 41 Vt. 655. In Massachusetts the court has shown an inclination to follow the English rule on this point. In McIntyre v. Parks, 3 Metc. (Mass.) 207, it was held that the bare fact of knowledge on the part of the vendor of the vendee's unlawful intent was not enough to avoid the sale; but this case, though not overruled, was criticised in Webster v. Munger, 8 Gray (Mass.) 584. And see GRAVES v. JOHNSON, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446; Hubbard v. Moore, 24 La. Ann. 591, 13 Am. Rep. 128; Sampson v. Townsend, 25 La. Ann. 78; Fishel v. Bennett, 56 Conn. 40, 12 Atl. 102.

cannot recover the price.³⁰⁵ It seems that it is otherwise where the crime intended to be perpetrated is merely *malum prohibitum* or of inferior criminality.³⁰⁶

If the particular circumstances do not bring the contract of sale within any of the cases mentioned above, then, according to the weight of authority in this country, the contract of sale is not illegal merely because the vendor knew that the goods were intended to be used for an unlawful purpose.³⁰⁷ "The law," it is said in a New York case, "does not punish a wrongful intent when nothing is done to carry that intent into effect; much less bare knowledge of such an intent, without any participation in it. Upon the whole, I think it clear, in reason as well as upon authority, that in a case like this, where the sale is not necessarily per se a violation of law, unless the unlawful purpose enters into and forms a part of the contract of sale, the vendee cannot set up his own illegal intent in bar of an action for the purchase money."³⁰⁸

Same—Loan.

According to the weight of authority, if a person lends money to another for the express purpose of enabling the borrower to use it to accomplish an illegal object, the transaction is illegal, and he cannot recover it.³⁰⁹ It is not easy to draw any legal distinction in respect to

³⁰⁵ HANAUER v. DOANE, 12 Wall. 342, 20 L. Ed. 439; Tatum v. Kelley, 25 Ark. 209, 94 Am. Dec. 717; Lightfoot v. Tenant, 1 Bos. & P. 556; Langton v. Hughes, 1 Maule & S. 593; TRACY v. TALMAGE, 14 N. Y. 162, 67 Am. Dec. 132; Howell v. Stewart, 54 Mo. 400; Russell v. Post, 138 U. S. 425, 11 Sup. Ct. 353, 34 L. Ed. 1009.

³⁰⁶ HANAUER v. DOANE, 12 Wall. 342, 20 L. Ed. 439; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; Hodgson v. Temple, 5 Taunt. 181; Howell v. Stewart, 54 Mo. 404.

³⁰⁷ TRACY v. TALMAGE, 14 N. Y. 162, 67 Am. Dec. 132; Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; ANHEUSER-BUSCH BREWING ASS'N v. MASON, 44 Minn. 318, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580; HANAUER v. DOANE, 12 Wall. 342, 20 L. Ed. 439; Bickel v. Sheets, 24 Ind. 1; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154 (but see Territt v. Bartlett, 21 Vt. 184; McConihe v. McMann, 27 Vt. 95); Walker v. Jeffries, 45 Miss. 160; Webber v. Donnelly, 33 Mich. 469; Cheney v. Duke, 10 Gill & J. (Md.) 11; Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138; Hedges v. Wallace, 2 Bush (Ky.) 442, 92 Am. Dec. 497; Armfield v. Tate, 29 N. C. 258; Rose v. Mitchell, 6 Colo. 102, 45 Am. Rep. 520; McKinney v. Andrews, 41 Tex. 363 (but see Roquemore v. Alloway, 33 Tex. 461); Howell v. Stewart, 54 Mo. 400; Delavina v. Hill, 65 N. H. 94, 19 Atl. 1000; Gambs v. Sutherland's Estate, 101 Mich. 355, 59 N. W. 652; Goodall v. Brewing Co., 56 Ohio St. 257, 46 N. E. 983. He who performs labor and furnishes materials for a bar and the room containing it may recover, though he knew they were intended to be used for unlawful purposes. Bryson v. Haley, 68 N. H. 337, 38 Atl. 1006.

³⁰⁸ TRACY v. TALMAGE, 14 N. Y. 162, 67 Am. Dec. 132.

³⁰⁹ Canman v. Bryce, 3 Barn. & Ald. 179; McKINNELL v. ROBINSON, 3 Moes. & W. 435; TYLER v. CARLISLE, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; White v. Buss, 3 Cush. (Mass.) 448; Ruckman v. Bryan, 3 Denio (N. Y.)

the legality of the transaction between a loan of money to be used for an illegal purpose and a sale of goods to be so used, and probably there is none. In a leading case it is said: "The plaintiff claims to recover a sum of money loaned by him while the defendant was engaged in playing at cards. The ruling at the trial was that if the plaintiff lent the money with an express understanding, intention, and purpose that it was to be used to gamble with, and it was so used, the debt so created cannot be recovered, but otherwise if the plaintiff had merely knowledge that the money was to be so used. Upon authority and principle the ruling was correct. * * * In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. There must be a combination of intention between lender and borrower,—a union of purposes. The lender must in some manner be a confederate or participator in the borrower's act,—be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man."³¹⁰

Unlawful Intention on One Side Only.

Where one of the parties intends a contract, innocent in itself, to further an illegal purpose, and the other enters into the contract in ignorance of his intention, the innocent party is entitled to full benefits under the contract.³¹¹ In the case of contracts of sale for future delivery, for instance, if one of the parties intends a bona fide sale, he may enforce the contract, though the other party may have intended no actual sale, but merely an illegal speculation on future prices.³¹²

346; Peck v. Briggs, Id. 107; Cutler v. Welsh, 43 N. H. 497; Wright v. Crabbs, 78 Ind. 487; Mordecai v. Dawkins, 9 Rich. Law (S. C.) 262; Williamson v. Bailey, 78 Mo. 636; Emerson v. Townsend, 73 Md. 224, 20 Atl. 984; Raymond v. Leavitt, 46 Mich. 447, 9 N. W. 525, 41 Am. Rep. 170; Critcher v. Holloway, 64 N. C. 526; Viser v. Bertrand, 14 Ark. 267; White v. Wilson's Adm'rs (Ky.) 38 S. W. 495. It has been said, however, that money, though loaned for the purpose of being used for gambling purposes, may be recovered, if it was not in fact so used. TYLER v. CARLISLE, supra.

³¹⁰ TYLER v. CARLISLE, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301. And see Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; Plank v. Jackson, 128 Ind. 424, 26 N. E. 568, 27 N. E. 1717; Jackson v. Bank, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657; Howell v. Stewart, 54 Mo. 400; Lyon v. Respass, 1 Litt. (Ky.) 133; Lewis v. Alexander, 51 Tex. 578; Waugh v. Beck, 114 Pa. 422, 6 Atl. 923, 60 Am. Rep. 354; Jones v. Bank, 9 Heisk. (Tenn.) 455. A loan of money, intended to pay lost bets, has been held to be recoverable. "The mischief had been completed," it was said in such a case. "The illegal act had been carried out before the money was lent." Pyke's Case, 8 Ch. Div. 756. And see Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747.

³¹¹ PIXLEY v. BOYNTON, 79 Ill. 351; Quirk v. Thomas, 6 Mich. 76; Scanlon v. Warren, 169 Ill. 142, 48 N. E. 410.

³¹² Williams v. Tiedemann, 6 Mo. App. 269; PIXLEY v. BOYNTON, 79

On the other hand, if the contract is still executory, he is not bound to go on with it, but may avoid it at his option.³¹³ Thus where, in an action for breach of an agreement by the defendant to let to plaintiff a set of rooms, it appeared that the plaintiff intended to use the rooms for the purpose of delivering blasphemous lectures, which were unlawful under a statute, though the defendant was not aware of such a purpose when the agreement was made, and he afterwards refused to allow the plaintiff to use the rooms, it was held that he was entitled to avoid the contract.³¹⁴

SAME—PROMISES TO PAY MONEY DUE ON ILLEGAL TRANSACTIONS.

182. The effect of a promise to pay money due or to become due upon an illegal transaction may be stated as follows:

- (a) **Where the transaction was illegal in the strict sense, and not merely void and unenforceable, the promise, not being in the form of a negotiable instrument, is void, whether under seal or not.**
- (b) **Where the transaction was not illegal, but merely void and unenforceable, a parol promise, not being in the form of a negotiable instrument, is void as without consideration; but a promise under seal is valid.**
- (c) **Where the promise is in the form of a negotiable instrument the above rules still apply as between the immediate parties, and as against all persons who are not bona fide purchasers for value. In the hands of bona fide purchasers for value the instrument is valid, whether the transaction was illegal or merely void, unless a statute declares that the instrument shall be void.**

Where a promise has been given to secure the payment of money due or about to become due upon an illegal transaction, the validity of such a promise, as between the immediate parties, or others occupying the same position, is based upon two considerations: (1) Whether the transaction was illegal or merely void, and (2) whether or not the promise is made under seal. Where the promise is given in the form of a negotiable instrument, a further question arises as to its value in the hands of third parties, but it will prevent confusion if we treat of the latter question separately.

There is a distinction, not very easy to analyze, but of considerable practical importance, between cases in which the common law or stat-

III. 351; *Whitesides v. Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390. Post, p. 341.

³¹³ *COWAN v. MILBOURN*, L. R. 2 Exch. 230; *CHURCH v. PROCTOR*, 66 Fed. 240, 13 C. C. A. 426. And see *Clay v. Yates*, 1 Hurl. & N. 78. But see *O'Brien v. Prietenbach*, 1 Hilt. (N. Y.) 304.

³¹⁴ *COWAN v. MILBOURN*, L. R. 2 Exch. 230.

utes make an object illegal, and cases in which they make it merely void. The effect of the difference is this: that in the one case the promise is regarded as given upon an illegal consideration, while in the other it is regarded as given on no consideration at all. In the first case everything connected with the transaction is "tainted with illegality," while in the second collateral contracts arising out of the avoided transaction are, under certain circumstances, supported.

In cases where the transaction is illegal, a promise, even under seal, given to secure the payment of money due upon it, is void. In an action upon a covenant to pay money, in which the defense was that the covenant was security for the payment of a sum of money due upon a purchase of land conveyed for a purpose prohibited by statute, the court of exchequer chamber, reversing the judgment of the queen's bench, held that the illegality, when proved, tainted the subsequent promise, and that this was not a simple promise to pay money, but that it "springs from and is the creature of the illegal agreement."³¹⁵ It will be noticed that in the case mentioned the promise was under seal, but that made no difference; for, although want of consideration will not defeat a sealed contract, the seal will not prevent the contract from being void if the consideration, where there was a consideration, was illegal. The objection on the ground of illegality is "rather that of the public, speaking through the court, * * * not from any consideration of the moral position and rights of the parties, but upon grounds of public policy."³¹⁶

Where the consideration is not illegal, but the transaction is merely void, a promise given to pay money due upon such a transaction is based upon no consideration at all. If made under seal, it is binding, for no consideration is then necessary; but, if made by parol, it is void. Where a municipal corporation, for instance, borrowed money, and gave a mortgage, which a statute declared it unlawful for them to give without complying with certain conditions which they failed to observe, it was held that, though the mortgage was invalid, the corporation was liable on its covenant therein to repay the money it had received.³¹⁷ So, also, in case of promises of payment made in consideration of past illicit cohabitation, the promises are invalid if made by parol; not on the

³¹⁵ *Fisher v. Bridges*, 3 El. & Bl. 642. And see *Everingham v. Meighan*, 55 Wis. 354, 13 N. W. 269; *Claffin v. Torlina*, 56 Mo. 369; *Howe v. Litchfield*, 3 Allen (Mass.) 443; *Stanton v. Allen*, 5 Denio (N. Y.) 435, 49 Am. Dec. 282; *Holden v. Cosgrove*, 12 Gray (Mass.) 216; *Hall v. Gavitt*, 18 Ind. 390; *Crossley v. Moore*, 40 N. J. Law, 27; *Chancely v. Bailey*, 37 Ga. 532, 95 Am. Dec. 350; *Coulter v. Robertson*, 14 Smedes & M. (Miss.) 18.

³¹⁶ *Lyon v. Waldo*, 36 Mich. 345, 353. See *Parks v. McKamy*, 3 Head (Tenn.) 297; *Wooden v. Shotwell*, 23 N. J. Law, 465; *Buffendeau v. Brooks*, 28 Cal. 641; *Seidenbender v. Charles' Adm'rs*, 4 Serg. & R. (Pa.) 151, 8 Am. Dec. 682.

³¹⁷ *Payne v. Mayor of Brecon*, 3 Hurl. & N. 579.

ground that the consideration is illegal, but because there is in fact no consideration at all.³¹⁸ A bond given upon such a past consideration, because of the seal, would be binding.³¹⁹

It is often a difficult question to determine whether a given contract is illegal or merely void, and there is much direct conflict in the decisions. Of course there can be no question but that it is illegal where it involves the commission of a crime which is *malum in se*, or, it seems, where it tends to the *prejudice of the public*, and is void because against public policy;³²⁰ but it is not so easy to declare a transaction illegal in the strict sense, where it is only unlawful because prohibited by statute. In an English case it was held that a note given to secure the payment of money under a wagering contract did not take its inception in illegality within the meaning of the rule we have been discussing. "There is no penalty attached to such a wager," it was said. "It is not in violation of any statute, nor of the common law, but is simply void; so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all."³²¹ In those of our states where wagers are held contrary to public policy, even where there is no statute prohibiting them, the ruling on this point would be different.³²²

Negotiable Instruments.

In the case of negotiable instruments we have to consider not only the effect of the illegality as between the original parties, but the effect upon subsequent holders of the instrument. A negotiable instrument given upon an illegal transaction is like any other simple contract as between the immediate parties, and cannot be enforced unless it has passed into the hands of a bona fide purchaser for value.³²³ Whether it can be enforced in the latter event will depend on the circumstances. The position of such a purchaser may be shortly stated as follows:

(1) If the transaction in which the instrument was given was not illegal, but merely void, so that the instrument is based, not on an illegal consideration, but on no consideration at all, it may be enforced by one who purchased the same for value before maturity, and with-

³¹⁸ BEAUMONT v. REEVE, 8 Q. B. 483.

³¹⁹ Ayerst v. Jenkins, L. R. 16 Eq. 275.

³²⁰ BISHOP v. PALMER, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; HARVEY v. MERRILL, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159.

³²¹ Fitch v. Jones, 5 El. & Bl. 245. See, also, THACKER v. HARDY, 4 Q. B. Div. 685.

³²² Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; HARVEY v. MERRILL, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; MOHR v. MIESEN, 47 Minn. 228, 49 N. W. 862; ante, p. 279.

³²³ Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172.

out notice of the want of consideration. In such a case it is to be presumed, *prima facie*, that the holder paid value, and had no notice of want of consideration.⁸²⁴

(2) If the transaction in which the instrument was given was illegal, unless the illegality is by force of a statute which renders the instrument absolutely void, a bona fide holder for value may enforce it. "If the legislature has declared that the illegality of the contract or consideration shall make the note void, the defendant may set up that defense, though the note be in the hands of a bona fide holder;³²⁵ but unless it has been so expressly declared by the legislature, illegality of consideration will be no defense against a bona fide holder, without notice, and for sufficient consideration, unless he obtained the note after it became due."³²⁶ In such a case, however, the ordinary presumption in favor of the holder does not exist. Upon proof of the illegality which tainted the instrument in its inception, the holder must show that he paid value for the instrument; and even then, if it is shown that he knew of the illegality, he cannot recover.³²⁷ Most courts even hold that the burden is on the holder to show that he had no notice of the illegality.³²⁸

⁸²⁴ Norton, Bills & N. (3d Ed.) 327, 332; *Mechanics' & Traders' Nat. Bank v. Crow*, 60 N. Y. 85; *Harger v. Worrall*, 69 N. Y. 370, 25 Am. Rep. 206; *Little v. Mills*, 98 Mich. 423, 57 N. W. 266.

³²⁵ *City of Aurora v. West*, 22 Ind. 88, 85 Am. Dec. 413; *Lagonda Nat. Bank v. Portner*, 46 Ohio St. 381, 21 N. E. 634; *Meadow v. Bird*, 22 Ga. 246; *Unger v. Boas*, 13 Pa. 601; *Snoddy v. Bank*, 88 Tenn. 573, 13 S. W. 127, 7 L. R. A. 705, 17 Am. St. Rep. 918; *Harper v. Young*, 112 Pa. 419, 3 Atl. 670; *Emerson v. Townsend*, 73 Md. 224, 20 Atl. 984; *Lucas v. Waul*, 12 Smedes & M. (Miss.) 157; *Faris v. King*, 1 Stew. (Ala.) 255; *Traders' Bank v. Alsop*, 64 Iowa, 97, 19 N. W. 863.

³²⁶ *Vallett v. Parker*, 6 Wend. (N. Y.) 615; *Town of Eagle v. Kohn*, 84 Ill. 292; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23; *Glenn v. Bank*, 70 N. C. 191; *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600; *Bayley v. Taber*, 5 Mass. 286, 4 Am. Dec. 57; *Root v. Merriam* (C. C.) 27 Fed. 909; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, 1 Am. St. Rep. 745; *Shaw v. Clark*, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474; *Thorne v. Yontz*, 4 Cal. 321; *Meadow v. Bird*, 22 Ga. 246; *Johnston v. Dickson*, 1 Blackf. (Ind.) 256; *Rockwell v. Charles*, 2 Hill (N. Y.) 499; *Knox v. White*, 20 La. Ann. 326. But see *Cunningham v. Bank*, 71 Ga. 400, 51 Am. Rep. 266.

³²⁷ Note 325, *supra*.

³²⁸ Norton, Bills & N. (3d Ed.) 333; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; *McDonald v. Aufdengarten*, 41 Neb. 40, 59 N. W. 762; *State Nat. Bank v. Bennett*, 8 Ind. App. 679, 36 N. E. 551.

SAME—RELIEF OF PARTY TO UNLAWFUL AGREEMENT.

- 183.** In no case can an action be maintained to enforce an illegal agreement.
- 184.** Where an agreement has been executed in whole or in part by the payment of money or the transfer of other property, the court will not generally lend its aid to recover it back. The rule is that the court will not lend its aid to a party who, as the ground of his claim, must disclose an illegal transaction. This rule is subject to exceptions as follows, where the action is brought, not to enforce the agreement, but in disaffirmance of it:
- EXCEPTIONS—**(a) In some cases a *locus penitentiæ* remains, and, while the agreement is unperformed, money or goods delivered in furtherance of it are allowed to be recovered.
- (b) Where the parties are not in *pari delicto*, the one who is less guilty may recover what he has parted with, as
- (1) Where the party asking relief was induced to enter into the agreement under the influence of fraud or strong pressure.
- (2) Where the law which makes the agreement unlawful was intended for the protection of the party asking relief.
- 185.** A broker, or other agent, employed to carry out an illegal transaction, cannot recover compensation, reimbursement, or indemnity in respect to the transaction, if he was privy to the principal's unlawful purpose.

It is a well-settled rule that in no case will the court lend its aid to the enforcement of an illegal agreement. Further than this, if the agreement has been executed, in whole or in part, by the payment of money or transfer of property, the court will not, as a rule, entertain an action to recover it back. The rule is necessary on the ground of public policy. "The objection," said Lord Mansfield in a leading case, "that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff; by accident, if I may so say. The principle of public policy is this: '*Ex dolo malo non oritur actio*.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would

then have the advantage of it; for where both are equally in fault, 'potior est conditio defendentis.' " 829

As we have said, therefore, a party to an illegal agreement cannot, under any circumstances, come into a court of law or equity and ask to have his illegal objects carried out; nor, as a rule, can he ask the court to relieve him from the effect of his agreement. He cannot set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.³²⁹ This rule is expressed in the maxim, "In pari delicto potior est conditio defendentis;" that is to say, where

³²⁹ HOLMAN v. JOHNSON, 1 Cowp. 341. See, also, FROST v. GAGE, 3 Allen (Mass.) 560; Shenk v. Phelps, 6 Ill. App. 612; Jameson v. Carpenter, 68 N. H. 62, 36 Atl. 554; Winchester Electric Light Co. v. Veal, 145 Ind. 506, 41 N. E. 334; Crichfield v. Paving Co., 174 Ill. 466, 51 N. E. 552. 42 L. R. A. 347.

³³⁰ Begbie v. Sewage Co., L. R. 10 Q. B. 499; BARCLAY v. PEARSON [1893] 2 Ch. 154; SCOTT v. BROWN [1892] 2 Q. B. 724; FROST v. GAGE, 3 Allen (Mass.) 560; EMERY v. CANDLE CO., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819; Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48; Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; Gotwalt v. Neal, 25 Md. 434; Roman v. Mali, 42 Md. 513; Bartle v. Coleman, 4 Pet. 184, 7 L. Ed. 825; Miller v. Marckle, 21 Ill. 152; Myers v. Meinrath, 101 Mass. 366, 3 Am. Rep. 368; St. Louis, V. & T. H. R. Co. v. Railroad Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. Ed. 748; Singer Mfg. Co. v. Draper, 103 Tenn. 262, 52 S. W. 879; Minzesheimer v. Doolittle, 60 N. J. Eq. 394, 45 Atl. 611. Where persons are engaged in an unlawful transaction, the court will not entertain a suit for an accounting in respect to the profits thereof. Jackson v. McLean (O. C.) 36 Fed. 213; McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; Atwater v. Manville, 106 Wis. 64, 81 N. W. 985. But if money has been actually paid to an agent for the use of his principal, the legality of the transaction of which it was the fruit does not affect the right of the principal to recover it out of the agent's hands, on the ground that, though the law would not have assisted the principal by enforcing the recovery of it from the party by whom it was paid, yet, when that contract is at an end, the agent, whose liability arises solely from having received the money for another's use, can have no right to retain it. Tenant v. Elliott, 1 Bos. & P. 3; Farmer v. Russell, Id. 295; McBlair v. Gibbes, 17 How. 236, 15 L. Ed. 132; Brady v. Horvath, 167 Ill. 610, 47 N. E. 757; Hertzler v. Geigley, 196 Pa. 419, 46 Atl. 366, 79 Am. St. Rep. 724; Hardy v. Jones, 63 Kan. 8, 64 Pac. 969, 88 Am. St. Rep. 223. In Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732, among other cases, the principle was applied so as to allow one member of a firm formed for the purpose of illegal transactions to recover from the other member his share of the profits. See, also, in support of this doctrine, State v. Railroad Co., 34 Md. 344, at page 365; Bonsfield v. Wilson, 16 Mees. & W. 185; Haacke v. Knights of Liberty, 76 Md. 429, 25 Atl. 422; Daniels v. Barney, 22 Ind. 207; Peters v. Grim, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599; Portsmouth Brewing Co. v. Mudge, 68 N. H. 462, 44 Atl. 600; McDonald v. Lund, 13 Wash. 412, 43 Pac. 348; Andrews v. Association, 74 Miss. 362, 20 South. 837, 60 Am. St. Rep. 509. There is certainly little reason in the distinction. One sued on an implied contract for services rendered

the parties are equally in fault the condition of the defendant is the better. The law, in such a case, will leave the parties where it finds them.³³¹

There are some exceptional cases, however, as stated in the black-letter text, in which a man may be relieved from an illegal agreement.

Locus Pœnitentiæ.

Although there is some difference of opinion on the subject, it is safe to say that in some cases of illegal agreements, at least if they are not mala in se, but merely mala prohibita, a locus pœnitentiæ remains, and that, while the illegal object has not been carried out by performance of the agreement, money paid or goods delivered under it may be recovered.³³² "It best comports with public policy to arrest the illegal proceeding before it is consummated."³³³ In a leading English case on this point the plaintiff had made a fictitious assignment of goods to a third party, to defraud his creditors, and the defendant, with a knowledge of the circumstances, had taken a bill of sale of the goods from the assignee, and afterwards, though the plaintiff demanded them back, had caused them to be put up at auction and sold. Nothing further had been done in respect of the fraud contemplated against the creditors, and the plaintiff was allowed to recover, on the ground that, as the illegal purpose was not carried out, there was a locus pœnitentiæ. "If money is paid," it was said in that case, "or goods delivered, for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits until the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action."³³⁴

So, also, in a case where persons had each deposited money with

may under a general denial show an express contract, and it is immaterial that such express contract was unlawful. *STEWART v. THAYER*, 170 Mass. 560, 49 N. E. 1020.

³³¹ *Howson v. Hancock*, 8 Term R. 575; *Perkins v. Savage*, 15 Wend. (N. Y.) 412; *Burt v. Place*, 6 Cow. (N. Y.) 431.

³³² *TYLER v. CARLISLE*, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; *BARCLAY v. PEARSON* [1893] 2 Ch. 154; *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98; *Peters v. Grim*, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599; *Skinner v. Henderson*, 10 Mo. 205; *Adams Exp. Co. v. Reno*, 48 Mo. 264; *Souhegan Nat. Bank v. Wallace*, 61 N. H. 24; *Wassermann v. Sloss*, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; *Stansfield v. Kunz*, 62 Kan. 797, 64 Pac. 614. But see *Knowlton v. Spring Co.*, 57 N. Y. 518.

³³³ *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755.

³³⁴ *Taylor v. Bowers*, 1 Q. B. Div. 291. See, also, *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Gowan's Adm'r v. Gowan*, 30 Mo. 472. The principle of *Taylor v. Bowers*, supra, as well as its application, was questioned in *Kearley v. Thomson*, 24 Q. B. Div. 742, 746.

another on a wager, and one of them, after a decision of the wager against him, but before the money was paid over, demanded it back, he was allowed to recover.³³⁵

On the other hand, if the illegal object has been effected by the mere deposit of the money or goods, they cannot be recovered. And it seems that, if the illegal contract has been performed in part, there can be no recovery.³³⁶ In an English case the defendant had agreed with the plaintiff to go bail for him for a specified time if the plaintiff would deposit with him the amount of the bail as an indemnity against his (plaintiff's) possible default, the defendant undertaking to return the money at the expiration of the specified time. Before the time had expired, the plaintiff sued for the money, on the ground that the agreement was illegal, and that he was entitled to rescind it. It was held that the illegal purpose was effected when the public lost "the protection which the law affords for securing the good behavior of the plaintiff;" for, as it was said, "when a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound, at his peril, to see that his principal obeys the order of the court. * * * But if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed."³³⁷

So, also, where a person placed money to the credit of a corporation to give it a fictitious credit in case of inquiries, the money to be returned to him at a specified time, and he sued to recover the same

³³⁵ *HAMPDEN v. WALSH*, 1 Q. B. Div. 189. And see *Fisher v. Hildreth*, 117 Mass. 558; *BERNARD v. TAYLOR*, 23 Or. 416, 31 Pac. 968, 18 L. R. A. 859, 37 Am. St. Rep. 693; *Lewis v. Bruton*, 74 Ala. 317, 49 Am. Rep. 816; *Weaver v. Harlan*, 48 Mo. App. 319; *McDonough v. Webster*, 68 Me. 530; *McAllister v. Hoffman*, 16 Serg. & R. (Pa.) 147, 16 Am. Dec. 556; *TYLER v. CARLISLE*, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301; *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *Wheeler v. Spencer*, 15 Conn. 28; *House v. McKenney*, 46 Me. 94; *Shannon v. Baumer*, 10 Iowa, 210; *Hodson v. Terrill*, 1 Cromp. & M. 797; *Hastelow v. Jackson*, 8 Barn. & C. 221; *Martin v. Hewson*, 10 Exch. 737; *Strachan v. Stock Exchange* [1895] 2 Q. B. 329; *Pabst Brewing Co. v. Liston*, 80 Minn. 473, 83 N. W. 448, 81 Am. St. Rep. 275. In many states by statute persons who have lost money by gambling may, under certain circumstances, recover it back. In some states by statute any money betted or staked is forfeit. *Ferguson v. Yunt*, 13 S. D. 120, 82 N. W. 509. In some by statute a stakeholder on notice must return it. *Turner v. Thompson*, 107 Ky. 647, 55 S. W. 210.

³³⁶ *Keasley v. Thomson*, 24 Q. B. Div. 742; *Ullman v. Association*, 167 Mo. 273, 66 S. W. 949, 56 L. R. A. 606; *Anson*, Cont. (8th Ed.) 219.

³³⁷ *Herman v. Jenchner*, 15 Q. B. Div. 561, overruling *Wilson v. Strugnell*, 7 Q. B. Div. 548. Otherwise where an agreement to indemnify the signer of a bail bond against loss is not against public policy. *MALONEY v. NELSON*, 12 App. Div. 545, 42 N. Y. Supp. 418; *MOLONEY v. SAME*, 158 N. Y. 351, 53 N. E. 31.

after the company had gone into liquidation, he was not allowed to recover, because "the object for which the advance was made was attained as the company continued to have a fictitious credit till the commencement of the winding-up."³³⁸

Par Delictum.

If the party asking to be relieved from the effect of an illegal agreement was induced to enter into the agreement by means of fraud, he is not always regarded as being in *pari delicto* with the other party, and the court may relieve him. As illustrating this rule is a case in which a party sued in equity to set aside a conveyance made in pursuance of an agreement which was illegal on the ground of champerty. It was urged that the parties were in *pari delicto*, but the court, being satisfied that the plaintiff had been induced to enter into the agreement by the fraud of the defendant, held that he was entitled to relief. "Where the parties," it was said, "to a contract against public policy, or illegal, are not in *pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him."³³⁹

So, where the party asking relief was induced to enter into the agreement under the influence of duress, strong pressure, or undue influence.³⁴⁰ "This is not a case of *par delictum*," it was said by an English judge in reference to a case of duress. "It is oppression on one side and submission on the other. It never can be predicated as *par delictum*, when one holds the rod and the other bows to it."³⁴¹ In a case, for instance, where a debtor sued to recover an additional

³³⁸ *In re Great Britain Steamboat Co.*, 26 Ch. Div. 616.

³³⁹ *Reynell v. Sprye*, 1 De Gex, M. & G. 660. See, also, *Ford v. Harrington*, 16 N. Y. 285; *Roman v. Mali*, 42 Md. 513; *Green v. Corrigan*, 87 Mo. 359; *Davidson v. Carter*, 55 Iowa. 117, 7 N. W. 466; *Barnes v. Brown*, 32 Mich. 146; *Belding v. Smythe*, 138 Mass. 530. So in New York it was held that money paid to a marriage broker may be recovered by the party who paid it, as obtained by constructive fraud; and that she will not be regarded as in *pari delicto* with him. *DUVAL v. WELLMAN*, 124 N. Y. 156, 26 N. E. 343.

³⁴⁰ *Reynell v. Sprye*, 1 De Gex, M. & G. 660; *Baehr v. Wolf*, 59 Ill. 470; *Richardson v. Crandall*, 48 N. Y. 348; *TRACY v. TALMAGE*, 14 N. Y. 162, 67 Am. Dec. 132; *Green v. Corrigan*, 87 Mo. 359; *Roman v. Mali*, 42 Md. 513; *Curtis v. Leavitt*, 15 N. Y. 9; *Mount v. Waite*, 7 Johns. (N. Y.) 434; *WHITE v. BANK*, 22 Pick. (Mass.) 181; *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398; *Gorringe v. Reed*, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692. Though a mortgage given by a father to prevent the prosecution of his son for a crime is illegal, he may sue to set it aside. Having executed it under strong pressure, he is not in *pari delicto* with the mortgagee. *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419.

³⁴¹ *SMITH v. CUFF*, 6 Maule & S. 160, at page 165.

sum, paid by him to one of his creditors, in fraud of the others, to induce the former to agree to a composition, he was allowed to recover, it being shown that the decision of several other creditors depended on the defendant's acceptance or rejection of the offer of a composition. "It is said that the parties are in *pari delicto*," said the court. "It is true that both are in *delicto*, because the act is a fraud upon the other creditors; but it is not *par delictum*, because the one has power to dictate, the other no alternative but to submit."³⁴²

The parties are not to be regarded as being in *pari delicto* where the agreement is merely *malum prohibitum*, and the law which makes it illegal was intended for the protection of the party asking relief.³⁴³ As illustrating this rule are cases in which banks or other corporations are prohibited under penalties from issuing bills or other securities, but no penalty is imposed on persons who receive the illegal securities. In such cases it is held that the law creating the illegality is to protect the public against the prohibited securities, that the corporation issuing them is the only offender, and that persons who receive them may recover the money paid for them. They are not in *pari delicto*. "The corporation issuing the bills contrary to law and against penal sanctions is deemed more guilty than the members of the community who receive them, whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law; and, if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them."³⁴⁴

If a broker or other agent is employed to carry out an illegal trans-

³⁴² *Atkinson v. Denby*, 6 Hurl. & N. 778, 7 Hurl. & N. 934. And see *Solinger v. Earle*, 82 N. Y. 393; *Crossley v. Moore*, 40 N. J. Law, 27; *Brown v. Everett-Ridley-Ragan Co.*, 111 Ga. 404, 36 S. E. 813.

³⁴³ In *Bowditch v. Insurance Co.*, 141 Mass. 292, 4 N. E. 798, 55 Am. Rep. 474, it was held that a statute providing that "no member of a committee or officer of a domestic insurance company, who is charged with the duty of investing its funds, shall borrow the same," was intended to protect the company and policy holders from the dishonesty or self-interest of the officers, and did not render a loan to an officer illegal, so as to prevent the company from recovering on his promise to repay. And see *White v. Bank*, 22 Pick. (Mass.) 181; *President, etc., of Atlas Bank v. President, etc.*, 3 Metc. (Mass.) 581; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Browning v. Morris*, 2 Cowp. 790; *Smith v. Bromley*, 2 Doug. 696; *Clarke v. Lumber Co.*, 59 Wis. 655, 18 N. W. 492; *Mason v. McLeod*, 57 Kan. 105, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. Rep. 327.

³⁴⁴ *Thomas v. City of Richmond*, 12 Wall. 349, 20 L. Ed. 453; *Oneida Bank v. Bank*, 21 N. Y. 490; *Smith v. Bromley*, 2 Doug. 696. Where a statute commands certain parties to do or prohibits them from doing certain acts, and prescribes penalties for their violation of its commands, the court may not inflict other penalties for its violation on other parties not named in the law by avoidance of their contracts. *Hanover Nat. Bank v. Bank*, 109 Fed. 421, 48 C. C. A. 482.

action, and is privy to the unlawful design, and by virtue of his employment performs services, makes disbursements, suffers losses, or incurs liabilities, he has no remedy against his principal.³⁴⁵ Not only is this true, but it has been held that any express promise made by the principal to reimburse him is void.³⁴⁶ This, of course, does not apply where a broker is employed to make contracts the illegality of which depends on the intention of his principal, and the broker is not aware of such intent; as, for instance, where a stock or grain broker is employed to sell stock or grain on the exchange for future delivery, and he is not aware of the fact that his principal intends, not an actual sale and delivery, but a mere gambling on the rise and fall of prices.³⁴⁷

CONFLICT OF LAWS.

186. IN SPACE. The validity of a contract is as a rule determined by the law of the place where it is made, but if it is to be performed in some other place its validity is as a rule determined by the law of that place.

EXCEPTION—A contract will not be enforced where to enforce it would be injurious to the interest of the state or country where it is sought to be enforced, or of its citizens.

187. IN TIME. An agreement which is illegal when made is not rendered valid by subsequent legislation. On the other hand a change in the law cannot render illegal an agreement which was legal when made, though it may render further performance impossible, and operate as a discharge.

³⁴⁵ Greenh. Pub. Pol. 110 (collecting the cases); HARVEY v. MERRILL, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; Foss v. Cummings, 149 Ill. 353, 36 N. E. 553; Kirkpatrick v. Adams (C. C.) 20 Fed. 287; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; Hooker v. Knab, 26 Wis. 511; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Fareira v. Gabell, 89 Pa. 89; Cunningham v. Bank, 71 Ga. 400, 51 Am. Rep. 266; Stewart v. Schall, 65 Md. 308, 4 Atl. 399, 57 Am. Rep. 327; Whitesides v. Hunt, 97 Ind. 191, 49 Am. Rep. 441; Colderwood v. McCrea, 11 Bradw. (Ill.) 543; Connor v. Black, 119 Mo. 126, 24 S. W. 184; Samuels v. Oliver, 130 Ill. 73, 22 N. E. 499; Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762. 59 Am. St. Rep. 302; Rogers v. Marriott, 59 Neb. 759, 82 N. W. 21. See, also, Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; Tiffany, Ag. 459.

³⁴⁶ Everingham v. Meighan, 55 Wis. 354, 13 N. W. 269; Embrey v. Jemison, 130 U. S. 396, 9 Sup. Ct. 776, 33 L. Ed. 172; Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203.

³⁴⁷ Rountree v. Smith, 108 U. S. 269, 2 Sup. Ct. 630, 27 L. Ed. 722; Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Edwards v. Hoeflinghoff (C. C.) 38 Fed. 635; Lehman v. Feld (C. C.) 37 Fed. 852; Boyd v. Hanson (C. C.) 41 Fed. 174; Pape v. Wright, 116 Ind. 502, 19 N. E. 459; MOHR v. MIESEN, 47 Minn. 228, 49 N. W. 862; Bartlett v. Collins, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928. A mere expectation on the part of the principal and broker, in sales for future delivery, that purchasers

As a general rule, subject to exceptions which we will notice briefly, the legality of a contract is to be determined by the law of the place where it is made and is to be performed. If it is valid there it is valid everywhere. "This rule is founded on the tacit consent of civilized nations, arising from its general utility, and seems to be a part of the law of nations adopted by the common law."³⁴⁸ A sale of goods, for instance, made and completed by delivery in one state, where it is valid, will be enforced in another state, though it would have been invalid if made in the latter state.³⁴⁹ A marriage, also, though strictly

from the principal may be willing to adjust the transactions by paying or receiving differences, when there is no agreement to that effect, does not render the contract illegal. *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403; ante, p. 278. In England, where gaming and wagering contracts are held not illegal at common law, but were by statute rendered null and void, but not illegal, money paid by an agent in pursuance of such a contract was recoverable from his principal. *THACHER v. HARDY*, 4 Q. B. D. 685. And see *Read v. Anderson*, 13 Q. B. D. 779; *Seymour v. Bridges*, 14 Q. B. D. 460; *Knight v. Lee* [1893] 1 Q. B. D. 41. This has since been changed by statute. *Tatam v. Reeve* [1893] 1 Q. B. 44.

³⁴⁸ *Pearsall v. Dwight*, 2 Mass., at page 89, 3 Am. Dec. 35. And see *Andrews v. Herriot*, 4 Cow. (N. Y.) 508, note (where the earlier cases are collected); *Ward v. Vosburgh* (C. C.) 31 Fed. 12; *Brown v. Finance Co.*, Id. 516; *SULLIVAN v. SULLIVAN*, 70 Mich. 583, 38 N. W. 472; *Western & A. R. Co. v. Cotton Mills*, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102; *Fessenden v. Taft*, 65 N. H. 39, 17 Atl. 713; *Central Trust Co. v. Burton*, 74 Wis. 329. 43 N. W. 141; *Appeal of Fowler*, 125 Pa. 388, 17 Atl. 431, 11 Am. St. Rep. 902; *Atlantic Phosphate Co. v. Ely*, 82 Ga. 438, 9 S. E. 170; *Fairchild v. Railroad Co.*, 148 Pa. 527, 24 Atl. 79; *FONSECA v. STEAMSHIP CO.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; *O'Regan v. Steamship Co.*, 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484; *Thompson v. Taylor*, 66 N. J. Law, 253, 49 Atl. 544, 54 L. R. A. 585. 88 Am. St. Rep. 485. A note executed in one state, and free from usury under its laws, is valid in another state, though, if made in the latter state, it would have been usurious. *Brown v. Finance Co.*, supra; *Matthews v. Paine*, 47 Ark. 54, 14 S. W. 463; *Van Vleet v. Sledge* (C. C.) 45 Fed. 743; *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638; *Staples v. Nott*, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480; *Buchanan v. Bank*, 55 Fed. 223, 5 C. C. A. 83. Note on gaming consideration, valid where it was made and the transaction took place, is enforceable in a state under whose laws it would have been void. *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23. Dealings in futures. *Ward v. Vosburgh* (C. C.) 31 Fed. 12; *Lehman v. Feld*, 37 Fed. 852. Sunday contract. *McKee v. Jones*, 67 Miss. 405, 7 South. 348; *Arbuckle v. Reaume*, 96 Mich. 243, 55 N. W. 808; *Adams v. Gay*, 19 Vt. 358; *Swann v. Swann* (C. C.) 21 Fed. 299; *Brown v. Browning*, 15 R. I. 422, 7 Atl. 403, 2 Am. St. Rep. 908; *O'Rourke v. O'Rourke*, 43 Mich. 58, 4 N. W. 531. Contract in consideration of dismissal of criminal prosecution valid where made. *Harrison v. Baldwin*, 5 Ohio Cir. Ct. R. 310.

³⁴⁹ *Greenwood v. Curtis*, 6 Mass. 377, 4 Am. Dec. 145; *Grant v. McLachlin*, 4 Johns. (N. Y.) 34; *Braun v. Keally*, 146 Pa. 519, 23 Atl. 389, 28 Am. St. Rep. 811; *Brinker v. Scheunemann*, 43 Ill. App. 659; *Dame v. Flint*, 64 Vt. 533, 24 Atl. 1051; *Clafin v. Meyer*, 41 La. Ann. 1048, 7 South. 139; *Kerwin v. Doran*, 29 Mo. App. 397; *Wagner v. Breed*, 29 Neb. 720, 46 N. W. 286.

not a contract, is governed by the same principle. If valid where it is executed, it is valid everywhere.³⁵⁰ On the other hand, a contract which is invalid where it is made and is to be performed is invalid everywhere. A note, for instance, which is void for usury in the state where it is executed, is void in another state, though, if made in the latter, it would have been valid.³⁵¹

The rule that a contract which is valid where it is made and is to be performed is valid everywhere is subject to exceptions. No state is bound to recognize and enforce a contract which is injurious to its own interests, or to the interests of its citizens. "This exception results from the consideration that the authority of the acts and contracts done in other states, as well as the laws by which they are regulated, are not, *proprio vigore*, of any efficacy beyond the territories of that state; and whatever effect is attributed to them elsewhere is from comity, and not of strict right. And every independent community will and ought to judge for itself how far that comity ought to extend. The reasonable limitation is that it shall not suffer prejudice by its comity. * * * Contracts, therefore, which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects; contracts against good morals, or against religion, or against public rights; and contracts opposed to the national policy or national institutions,—are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made."³⁵² To illustrate this exception, a contract made in one coun-

³⁵⁰ *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Sutton v. Warren*, 10 Metc. (Mass.) 451; *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395; *Ilderton v. Ilderton*, 2 H. Bl. 145; *Inhabitants of West Cambridge v. Inhabitants of Lexington*, 1 Pick. (Mass.) 507, 11 Am. Dec. 168; *Thorp v. Thorp*, 90 N. Y. 602, 43 Am. Rep. 189; *Jackson v. Jackson*, 82 Md. 17, 33 Atl. 137, 34 L. R. A. 773. Cf. *In re Stall's Estate*, 183 Pa. 625, 39 Atl. 16, 63 Am. St. Rep. 776; *McLennan v. McLennan*, 31 Or. 480, 50 Pac. 802, 38 L. R. A. 863, 65 Am. St. Rep. 815.

³⁵¹ *Van Schaick v. Edwards*, 2 Johns. Cas. (N. Y.) 355; *Matthews v. Paine*, 47 Ark. 54, 14 S. W. 463; *Meroney v. Association*, 112 N. C. 842, 17 S. E. 637. Note void for gaming in France, where it is made, is void in England. *Robinson v. Bland*, 2 Burrows, 1077. And see, for other cases, *Touro v. Cassin*, 1 Nott & McC. (S. C.) 173, 9 Am. Dec. 680; *Tolman Co. v. Reed*, 115 Mich. 71, 72 N. W. 1104; *Washington Nat. Building Loan & Inv. Co. v. Stanley*, 38 Or. 319, 63 Pac. 489, 58 L. R. A. 816, 84 Am. St. Rep. 793; *Alexander v. Barker*, 64 Kan. 396, 67 Pac. 829. Sale made in another state in violation of its liquor laws. *Tredway v. Riley*, 32 Neb. 495, 49 N. W. 268, 29 Am. St. Rep. 447; *Wind v. Her*, 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219. Stipulation relieving carrier from liability. *Brockway v. Express Co.*, 168 Mass. 257, 47 N. E. 87.

³⁵² Story, *Confl. Law*, § 244; *Randall v. Protective Union*, 43 Neb. 876, 62 N. W. 252. And see *Greenwood v. Curtis*, 6 Mass. 378, 4 Am. Dec. 145; *Davis v. Bronson*, 6 Iowa, 110; *Kentucky v. Bassford*, 6 Hill (N. Y.) 526; *Territt v. Bartlett*, 21 Vt. 189; *Blanchard v. Russell*, 13 Mass. 6, 7 Am. Dec.

try to smuggle goods into another in violation of its laws will not be enforced in the latter country.⁸⁵³ So also a sale of intoxicating liquors or other goods in one state will not be enforced in another state, where the intention of both parties was to import the goods into the latter state, and sell them in violation of its laws.⁸⁵⁴ So of contracts made in a foreign country for future illicit cohabitation and prostitution.⁸⁵⁵

An exception to the rule that contracts which are invalid where they are made are invalid everywhere is in the case of contracts violating the revenue laws. It seems to have been an established doctrine of the common law that a nation will not recognize or enforce the revenue laws of another country, and that the contracts of its own subjects, made to evade or defraud the revenue laws of foreign nations, may be enforced in its own courts.⁸⁵⁶ This doctrine has been deprecated by eminent judges and lawyers, and the later cases have shown a tendency to hold the contrary.⁸⁵⁷

1; *In re Dalpay*, 41 Minn. 532, 43 N. W. 564, 6 L. R. A. 108, 16 Am. St. Rep. 729; *Savings Bank of Kansas v. Bank (C. C.)* 38 Fed. 800; *Kilcrease v. Johnson*, 85 Ga. 600, 11 S. E. 870; *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473. See, also, *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. A contract made in another state, though valid there, will not be enforced if it is opposed to the public policy of the state of the forum. *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; *Seamans v. Temple Co.*, 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457; *Thompson v. Taylor*, 65 N. J. Law, 107, 46 Atl. 567; *Bartlett v. Collins*, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928; *Gooch v. Faucett*, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835; *Winward v. Lincoln*, 23 R. I. 476, 51 Atl. 106; *Welling v. Association*, 56 S. C. 280, 34 S. E. 409; *Parker v. Moore*, 115 Fed. 799, 53 C. C. A. 369. But see *FONSECA v. STEAMSHIP CO.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660; *O'Regan v. Same*, 160 Mass. 356, 35 N. E. 1070, 39 Am. St. Rep. 484.

⁸⁵³ *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468; *HOLMAN v. JOHNSON*, Cowp. 341. See, also, ante, p. 329.

⁸⁵⁴ *Aiken v. Blaisdell*, 41 Vt. 655; *Bancher v. Mansel*, 47 Me. 58; *Webster v. Munger*, 8 Gray (Mass.) 584; *Davis v. Bronson*, 6 Iowa, 410. Or even in the state where the sale was made. *GRAVES v. JOHNSON*, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 3 Am. St. Rep. 446.

⁸⁵⁵ *Walker v. Perkins*, 3 Burrows, 1568; *Jones v. Randall*, Cowp. 37; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) at page 228, 3 Am. Dec. 555; *Robinson v. Bland*, 2 Burrows, 1084. Marriage valid where entered into, but incestuous in Pennsylvania, will not be there recognized. *U. S. v. Rodgers* (D. C.) 109 Fed. 886.

⁸⁵⁶ *Story*, Conf. Law, §§ 245, 256, 257; *Boucher v. Lawson*, Cas. t. Hardw. 84, 89, 191; *HOLMAN v. JOHNSON*, Cowp. 341; *Ludlow v. Van Rensselaer*, 1 Johns. (N. Y.) 94.

⁸⁵⁷ *Story*, Conf. Law, §§ 245, 256, 257. A bill or note void for want of a stamp is void everywhere, though, if the stamp is merely a condition of its admissibility in evidence, this will have no effect outside the jurisdiction. *Alves v. Hodgson*, 7 T. R. 241; *Bristow v. Sequeville*, 5 Ex. 275; *Fant v. Miller*, 17 Grat. (Va.) 47.

The rule stated at the beginning of this paragraph only applies, it will be noticed, where the contract is to be performed where it is made. Where it is either expressly or by implication to be performed at some other place, "there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, * * * is to be governed by the law of the place of performance."³⁵⁸

Change of Law.

An agreement which is illegal and void at the time of its inception cannot be rendered valid by subsequent legislation;³⁵⁹ nor, on the other hand, can a change of the law render invalid a contract which was valid when made.³⁶⁰ Where, however, performance of a contract lawful in its inception is made unlawful by any subsequent legislation or event, the contract is thereby dissolved, unless the statute, to have this effect, would be unconstitutional, as impairing the obligation of contract.

³⁵⁸ Story, *Confl. Law*, § 280; *Andrews v. Pond*, 13 Pet. 65, 10 L. Ed. 61; *Frazier v. Warfield*, 9 Smedes & M. (Miss.) 220; *Thayer v. Elliott*, 16 N. H. 104; *First Nat. Bank v. Hall* (Pa.) 24 Atl. 665; *Liverpool & G. W. Steam Co. v. Insurance Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788. That a note is governed by the law of the place where it is payable, see *Stevens v. Gregg* (Ky.) 12 S. W. 775; *Tenant v. Tenant*, 110 Pa. 478, 1 Atl. 532; *Barrett v. Dodge*, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777; *Bigelow v. Burnham*, 83 Iowa, 120, 49 N. W. 104, 32 Am. St. Rep. 294; *Bennett v. Eastern Building & Loan Ass'n*, 177 Pa. 233, 35 Atl. 684, 34 L. R. A. 595, 55 Am. St. Rep. 723; *Building & Loan Ass'n of Dakota v. Logan*, 66 Fed. 827, 14 C. C. A. 133; *Hieronymus v. Association* (C. C.) 101 Fed. 12. Contract to be performed partly in state where made and partly elsewhere. *Bartlett v. Collins*, 109 Wis. 477, 85 N. W. 703, 83 Am. St. Rep. 928.

³⁵⁹ *HANDY v. PUBLISHING CO.*, 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; *Puckett v. Alexander*, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; *Mays v. Williams*, 27 Ala. 267. Repeal of law does not validate prior invalid contract. *Hathaway v. Moran*, 44 Me. 67; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286; *Robinson v. Barrows*, 48 Me. 186; *Bancher v. Mansel*, 47 Me. 58; *Webber v. Howe*, 36 Mich. 150, 24 Am. Rep. 590; *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435; *Gilliland v. Phillips*, 1 S. C. 152; *Bailey v. Mogg*, 4 Denio (N. Y.) 60; *Ottaway v. Lowden*, 55 App. Div. 410, 66 N. Y. Supp. 952; *Denning v. Yount*, 62 Kan. 217, 61 Pac. 803, 50 L. R. A. 103. Otherwise where contract merely voidable and not void. *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682. And see *Hartford Fire Ins. Co. v. Railway Co.* (C. C.) 62 Fed. 904.

³⁶⁰ *Boyce v. Tabb*, 18 Wall. 546, 21 L. Ed. 757; *Jump v. Johnson* (Ky.) 13 S. W. 843; *Richardson v. Campbell*, 34 Neb. 181, 51 N. W. 753, 33 Am. St. Rep. 633; *Knight v. Lee* [1893] 1 Q. B. 41; *Stephens v. Railway Co.*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17.

CHAPTER IX.

OPERATION OF CONTRACT.

- 188. Limits of Contractual Relation—In General.
- 189–190. Imposing Liability on Third Persons.
- 191–192. Conferring Rights on Third Persons.
- 193. Assignment of Contracts—In General.
- 194. Assignment of Liabilities by Act of Parties.
- 195–197. Assignment of Rights by Act of Parties.
- 198. Assignment by Operation of Law.
- 199. On Transfer of Interests in Land.
- 200. On Marriage.
- 201. On Death.
- 202. Joint and Several Contracts—In General.
- 203–204. Joint Contracts.
- 205–206. Several Contracts.
- 207. Contracts both Joint and Several.
- 208. Contribution between Joint Debtors.

Thus far we have endeavored to show what is necessary to the formation and existence of a valid contract. Having ascertained this, we must next consider its effect when formed. In doing so we will first ascertain to whom the obligation of a contract extends, or who have rights or liabilities under it. Then we shall ascertain the extent to which the rights and liabilities may be assigned or pass to others than the original parties. After that we will consider the operation and effect of a contract having several parties on one or both sides.

LIMITS OF CONTRACTUAL RELATION—IN GENERAL.

- 188. As a rule, a contract does not impose liabilities nor confer rights on a person who is not a party to it.**

EXCEPTIONS—(a) There are apparent exceptions to this rule:

- (1) Where one person represents another in entering into a contract; that is, in the case of contracts through agents.
- (2) Where the rights or liabilities created by a contract pass to a person or persons other than the original parties by assignment.

(b) There are also real exceptions to the rule in some jurisdictions.

The rule that a person who is not a party to a contract cannot be included in the rights or liabilities which it creates, so as to entitle him to sue, or render him liable to be sued, upon it, flows from the very nature of contract as a legal conception. As we have seen, a true con-

tract is an agreement between two or more persons, by which an obligation or legal tie is created, binding those persons together, so that one or each has the right to require some act or forbearance on the part of the other. As a rule, the legal relations of third persons are not affected, because they are not parties to the agreement. They are not bound by the legal bond which it creates, and a breach thereof cannot give them any rights. Nor, on the other hand, can any liabilities be imposed upon them.

It will be noticed that the rule stated in the black-letter text is divisible. There are in fact two rules,—the first, that a contract cannot impose liabilities, and the second, that it cannot confer rights, on a person who is not a party to it.¹ We can better reach a correct understanding of the law on this subject if we consider each of these rules separately, together with the exceptions, or apparent exceptions, peculiar to it; but before doing so we must notice two apparent exceptions to the rule as a whole.

Apparent Exceptions to the Rule—Agency.

Although one person cannot, as a rule, by contract with another, impose liabilities, nor confer rights, on a third person not a party to the contract, one person may represent another, as being employed by him, for the purpose of bringing him into contractual relations with a third. Employment for this purpose is called “agency,” the employer being called the “principal” and the employed his “agent.” The acts of the agent in making contracts are done on behalf, and generally, though not necessarily, in the name, of his principal. The principal really becomes a party to the contract made for him by his agent. A contract made by an agent can bind the principal only by force of a previous authority or subsequent ratification by the principal, and this authority or ratification is nothing else than the assent of the principal to be bound. The contract which binds him is his own contract. After all, therefore, this is only an apparent exception to the rule that persons not parties to a contract are not bound or given rights thereby.

The subject of agency will be dealt with in a subsequent chapter.

Same—Assignment of Contracts.

If John Doe contracts with Richard Roe, their contract cannot impose liabilities or confer rights upon John Styles. There are circumstances, however, under which John Doe or Richard Roe may substitute John Styles for himself as a party to the contract, and there are circumstances under which the law would operate to effect this substitution. John Styles thus becomes a party to the contract. This substitution is called assignment of the contract. Before discussing assignment we will take up in turn, and explain, each subdivision of

¹ Anson, *Cont.* (4th Ed.) 209.

the general rule mentioned in the black-letter text, and show the exceptions to which it is subject.

SAME—IMPOSING LIABILITY ON THIRD PERSONS.

189. A contract cannot impose liabilities on a person who is not a party to it.

190. A contract, however, between master and servant at least, imposes a duty on third persons not to interfere maliciously with its performance by inducing the servant to break it, and for a violation of this duty an action will lie. Many courts hold that the doctrine applies to all contracts.

The proposition that a man cannot incur liabilities from a contract to which he was not a party is a part of a wider rule that liability ex contractu cannot be imposed upon a man otherwise than by his act or consent. "A man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor."² Two persons cannot, by any contract into which they may enter, thereby impose liabilities upon a third person.³ Where a person, for instance, contracts with another to perform services for him, or to sell him goods, he may, under some circumstances, procure the services to be rendered or the goods delivered by a third person, and thus perform his contract; but he cannot, by any such agreement with a third person, confer upon the latter the right to require payment of the other party. Nor will the law create a contract between the latter and such third person because of the acceptance of the services or goods, where there was no intention to enter into legal relations with the third person.⁴

Contract may Impose Duty on Third Parties.

Though a contract cannot impose the burdens of an obligation upon one who was not a party to it, it may impose a duty upon persons extraneous to the obligation not to interfere maliciously with its due performance. In a leading English case, *Lumley v. Gye*,⁵ where a person induced a singer to break her contract with the manager of an opera house, and was sued by the manager for maliciously procuring the breach, it was argued (1) that an action would lie against one who procured the breach of any kind of contract; and (2) that, if that were not

² *Durnford v. Messiter*, 5 Maule & S. 446; *Hearn v. Cullin*, 54 Md. 533.

³ *Rossman v. Townsend*, 17 Wis. 98, 84 Am. Dec. 733; *Bolles v. Carli*, 12 Minn. 113 (Gil. 62).

⁴ *Schmaling v. Thomlinson*, 6 Taunt. 147; *BOSTON ICE CO. v. POTTER*, 123 Mass. 28, 25 Am. Rep. 9; *School Dist. of Beatrice v. Thomas*, 51 Neb. 740, 71 N. W. 731; post, p. 351.

⁵ 2 El. & Bl. 216.

so, an action would lie, at any rate, for inducing a servant to quit the service of his master. The relation of master and servant has always been held to involve a right on the part of the master to sue any one who enticed away his servant, and so the court was called upon to answer two questions: Does an action lie for procuring a breach of any contract? If not, then does the exceptional rule applicable to the contract of master and servant apply to the manager of a theater and the actors whom he engages to perform? The majority of the court answered both questions in the affirmative, with the qualification that the inducement must be malicious. Later English cases have affirmed this decision, but upon the broad ground that it is an actionable wrong maliciously to induce another to break a contract.⁶ If the interference is used for the purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, the conduct is malicious. The same doctrine has been held by many courts in this country.⁷ On the other hand, some courts have held that the doctrine does not apply to other contracts than the contract between master and servant.⁸ As to this contract, there is probably no conflict at all.⁹

⁶ *Bowen v. Hall*, 6 Q. B. Div. 339; *Temperton v. Russell* [1893] 1 Q. B. 376.

⁷ *WALKER v. CRONIN*, 107 Mass. 555; *Jones v. Stanly*, 76 N. C. 355; *Lucke v. Clothing Cutters*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; *Jones v. Blocker*, 43 Ga. 331; *Chipley v. Atkinson*, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Angle v. Railroad Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Van Horn v. Van Horn*, 56 N. J. Law, 318, 28 Atl. 669; *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869. And see *Ensor v. Bolgiano*, 67 Md. 190, 9 Atl. 529; *Dudley v. Briggs*, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494; *Burgess v. Carpenter*, 2 S. C. 7, 16 Am. Rep. 643; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 43 L. R. A. 797, 68 Am. St. Rep. 203.

⁸ *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165; *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Bourlier v. Macauley*, 91 Ky. 135, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. Rep. 171; *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; *Glencoe Land & Gravel Co. v. Commission Co.*, 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 560. All the courts probably agree, however, that an action will lie by a party to a contract against a third person for fraudulent representations by the latter, inducing the other party to the contract to break it. *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623; *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559.

⁹ *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *NOICE v. BROWN*, 39 N. J. Law, 569; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373; *Woodward v. Washburn*, 3 Denio (N. Y.) 369; *WALKER v. CRONIN*, 107 Mass. 555; *Ames v. Railway Co.*, 117 Mass. 541, 19 Am. Rep. 426; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Jones v. Blocker*, 43 Ga. 331; *Daniel v. Swearengen*, 6 S. C. 297, 24 Am. Rep. 471; *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680.

SAME—CONFERRING RIGHTS ON THIRD PERSONS.

- 191.** As a rule, a contract cannot confer rights on a person who is not a party to it.
- 192. EXCEPTIONS—**(a) The rule is subject to apparent exceptions as follows:
- (1) If the contract is such as to constitute the promisor trustee for the benefit of the third person, the latter may sue in equity.
 - (2) Where money or other property has come into the promisor's hands by virtue of the contract, for the use of the third person, the law creates a so-called contract between him and such third person, on which the latter may sue.
- (b) In many of the states an exception is made in case of a promise made for the benefit of a third person, and the latter is allowed to sue thereon. It seems, however, that there must be such a relation between the promisee and the person for whose benefit the promise is made as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the former to the latter.

This rule, in its general application, is recognized by all courts. It is settled, for instance, that where a bilateral contract is made, a third person cannot perform for one of the parties, and himself claim performance by the other. He cannot thus acquire rights under the contract, even by agreement with the party whose promise he performs, unless the contract, as will be presently explained, is assignable, and is assigned. This is, in effect, another way of looking at the rule which we have already considered,—that a contract cannot impose liabilities on a person not a party to it.

In a leading English case, shippers had employed a firm of brokers to transport a quantity of cocoa for them, and the brokers got a third person to do it. It was held that the latter could not sue the shippers for his expenses and commission, inasmuch as there was no privity of contract between him and them. It was said that the brokers were employed by the shippers to do the whole work for them; that the shippers looked to the brokers for the performance of the work, and the brokers had a right to look to them for payment, and that no one else had that right.¹⁰ This case illustrates both of the rules which we are considering. The contract between the brokers and the third person could not impose a liability on the shippers, as they were not parties to it; nor could the contract between the shippers and the brokers confer any rights upon the third person, since he was not a party to it.

Thus far the rule is clear and is not controverted.¹¹ A difficulty,

¹⁰ *Schmalzing v. Thomlinson*, 6 Taunt. 147.

¹¹ *Standard Oil Co. v. Murray*, 119 Fed. 572, 57 C. C. A. 1. To the effect that a company which has contracted with a city to supply it with water

and considerable difference of opinion, arises, however, where the contract consists of a promise expressly made by one of the parties for the benefit of a third person; as, where one of the parties, for a consideration moving from the other, promises him to pay money to, or perform services for, a stranger to the contract. There may be said to be three different doctrines on this point; and probably there are more. For convenience we will call them the English,¹² the Massachusetts, and the New York doctrines, and will treat them separately.

Promise for Benefit of Third Person—The English Doctrine.

If two persons should make a contract in which one promises to do something for a third person, all three might be willing that such third person should have all the rights of an actual contracting party, and should be allowed to sue on the promise. In England, however, it is established that the action cannot be maintained. If a person makes a promise to another, the consideration for which is a benefit to be conferred by the promisee on a third person, the contract confers no right on the third person to sue. In a leading English case the defendant had made a promise that, in consideration of the promisee's working for him, he would pay the plaintiff a sum of money, and it was held that the plaintiff could not recover on the promise. The members of the court stated in different forms the same reason for their decision. One said that the declaration did not "show any consideration for the promise moving from the plaintiff to defendant;" another, that "no privity is shown between the plaintiff and the defendant;" another, that it was "consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement" between the promisee and the defendant; and another, that there was "no promise to the plaintiff alleged."¹³

Same—Exceptions.

It was at one time thought in England that, if the person who was to take a benefit under the contract was nearly related by blood to the promisee, a right of action would vest in him;¹⁴ but such a doc-

for extinguishing fires is not liable for breach of the contract to a citizen whose property is destroyed because of such breach, see *Becker v. Waterworks*, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; *Fitch v. Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *House v. Waterworks Co.*, 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; *BOSTON SAFE-DEPOSIT & TRUST CO. v. SALEM WATER CO.* (C. C.) 94 Fed. 238. Contra, *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77, 25 Am. St. Rep. 536; *GORRELL v. WATER SUPPLY CO.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598.

¹² *Anson*, Cont. (4th Ed.) 212 et seq.

¹³ *PRICE v. EASTON*, 4 Barn. & Adol. 433. And see *TWEDDLE v. ATKINSON*, 1 Best & S. 393.

¹⁴ *DUTTON v. POOLE*, 2 Lev. 210; *BOURNE v. MASON*, 1 Vent. 6.

trine, if it ever really existed, has been overruled. In a case in which the respective fathers of the parties to a marriage had entered into a contract between themselves only that each should pay a sum of money to the husband, and expressly stipulated that the latter should have power to sue therefor, it was held that an action by him would not lie. "Some of the old decisions," it was said, "appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it if he stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration. * * * It is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."¹⁵

In courts of equity, language has been used, sometimes very explicit, to the effect that, where money is payable to one person for the benefit of another, the latter "can claim under the contract as if it had been with himself;"¹⁶ but the later cases go to show that even in equity a person who was not a party to a contract cannot acquire rights thereunder and sue thereon.¹⁷ The beneficiary of a contract acquires no rights *ex contractu*, even in equity. If the contract is so framed as to make one of the parties trustee for a third person for whose benefit it is made, such third person acquires rights by virtue of the trust. A mere contract, however, between two parties, that one of them shall pay money to a third, does not make that third person a *cestui que trust*. There must be some declaration of trust by one of the contracting parties in favor of the third person.¹⁸

Same—Massachusetts Doctrine.

The English doctrine on this subject is also recognized by the Massachusetts court, and by the courts of some of the other states.¹⁹ "The

¹⁵ *TWEDDLE v. ATKINSON*, 1 Best & S. 393.

¹⁶ *Touche v. Warehousing Co.*, 6 Ch. App. 671; *Spiller v. Skating Rink*, 7 Ch. Div. 368.

¹⁷ *Eley v. Assurance Co.*, 1 Exch. Div. (Ct. App.) 88; *In re Empress Eng. Co.*, 16 Ch. Div. 125.

¹⁸ Two English cases, decided about the same time, are cited by Anson as illustrating this distinction. In one it was held that a clause in a contract of partnership which provided for the payment of an annuity, for five years after the determination of the partnership, to the retiring partner or his widow, created a trust in favor of the widow. *Murray v. Flavell*, 25 Ch. Div. 89. On the other hand, where a person had employed the plaintiff in the formation of the defendant company, and afterwards agreed with the company that it should pay the plaintiff for his services, it was held that the agreement gave no right of action to the plaintiff. *In re Rotherham Alum Co.*, 25 Ch. Div. 104.

¹⁹ *EXCHANGE BANK v. RICE*, 107 Mass. 37, 9 Am. Rep. 1; *Rogers v. Stone Co.*, 130 Mass. 581, 39 Am. Rep. 478; *Wheeler v. Stewart*, 94 Mich. 445, 54 N. W. 172; *Linneman v. Moross' Estate*, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528; *Edwards v. Clement*, 81 Mich. 513, 45 N. W. 1107;

general rule of law," it was said by the Massachusetts court, "is that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract; and, consequently, that a promise made by one person to another for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter."²⁰

Same—Exceptions to the Massachusetts Doctrine.

There is no doubt that in this country courts of equity recognize the apparent exception to this rule, already mentioned in the case of trusts; and that where a contract, consisting of a promise for the benefit of a third person, is so framed as to make the promisor a trustee for such third person, the latter may sue to enforce the trust.²¹

Pipp v. Reynolds, 20 Mich. 88; Woodland v. Newhall's Adm'r (C. C.) 31 Fed. 434; ADAMS v. KUEHN, 119 Pa. 76, 13 Atl. 184; Wilbur v. Wilbur, 17 R. I. 295, 21 Atl. 497; Baxter v. Camp, 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169; Morgan v. Randolph & Clowes Co., 73 Conn. 396, 47 Atl. 658, 51 L. R. A. 653. The exceptions to the rule that a stranger to a contract cannot maintain an action on it were stated by the supreme court of the United States in language frequently referred to by that court with approval, as follows: "There are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and, if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now." Second Nat. Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75. See, also, Keller v. Ashford, 123 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. Ed. 210; Union Mut. Life Ins. Co. v. Hanford, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118; Johns v. Wilson, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. Ed. 613. The question whether the remedy of the mortgagee against a grantor who has assumed the mortgage is in law in his own right, or in equity and in the right of the mortgagor only, is to be determined by the law of the place where the suit is brought. Willard v. Wood, *supra*; Union Mut. Life Ins. Co. v. Hanford, *supra*; Johns v. Wilson, *supra*. See, also, Adams v. Shirk, 105 Fed. 659, 44 C. C. A. 653.

²⁰ EXCHANGE BANK v. RICE, 107 Mass. 37, 9 Am. Rep. 1.

²¹ Union Pac. R. Co. v. Durant, 95 U. S. 576, 24 L. Ed. 391; Chace v. Chapin, 130 Mass. 128; Preachers' Aid Soc. v. England, 106 Ill. 125; Mory

In addition to this, there is another apparent exception. This exception is in cases where, under a contract in which a promise is made for the benefit of a third person, assets come to the promisor's hands, or under his control, which in equity belong to the third person; or, as it has been expressed, "those cases in which the defendant has in his hands money which in equity and good conscience belongs to the plaintiff, as where one person receives from another money or property as a fund from which certain creditors of the depositor are to be paid, and promises, either expressly or by implication from his acceptance of the money or property without objection to the terms on which it is delivered to him, to pay such creditors."²² In such cases the third person may sue the promisor in his own name. The rights of the third person are not conferred upon him by the contract between the promisor and promisee, but arise out of a contract created by law, or quasi contract, between the promisor and the third person.²³

The exception formerly recognized in England, but since overruled there, to the effect that, if a third person for whose benefit a contract is made is nearly related by blood to the promisee, a right of action on the promise vests in him, has been recognized in this country,²⁴ but some of the courts have refused to recognize it.²⁵ Even in Massachusetts, where it has been directly held, the court has since expressed a doubt on the question, even if it has not expressly held the contrary.²⁶

Same—The New York Doctrine.

In New York, and in most of the other states, the courts have refused to recognize the doctrine that a person for whose benefit a promise is made cannot sue the promisor unless he was a party to the contract. In a leading New York case a debtor of the plaintiff had loaned money to the defendant, and the defendant had promised him to pay the plaintiff. The plaintiff was not a party to the contract, but it was

v. Michael, 18 Md. 227; *Harrisburg Bank v. Tyler*, 3 Watts & S. (Pa.) 373. And see *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed. 90.

²² *EXCHANGE BANK v. RICE*, 107 Mass. 37, 9 Am. Rep. 1.

²³ *Carnegie v. Morrison*, 2 Metc. (Mass.) 381; *Putnam v. Field*, 103 Mass. 556; *Spencer v. Towles*, 18 Mich. 9; *Grim v. Iron Co.*, 115 Pa. 611, 8 Atl. 595; *Hosford v. Kanouse*, 45 Mich. 620, 8 N. W. 567; *Second Nat. Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75; *Hostetter v. Hollinger*, 117 Pa. 606, 12 Atl. 741; *O'Neal v. Board*, 27 Md. 227; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427; *Lewis v. Sawyer*, 44 Me. 332; *Keene v. Sage*, 75 Me. 138; *Taylor v. Taylor*, 20 Ill. 650.

²⁴ *Felton v. Dickinson*, 10 Mass. 287; *Benge v. Hiatt's Adm'r*, 82 Ky. 666, 56 Am. Rep. 912. See, also, *BUCHANAN v. TILDEN*, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454; *Everdell v. Hill*, 27 Misc. Rep. 285, 58 N. Y. Supp. 447.

²⁵ *Wilbur v. Wilbur*, 17 R. I. 295, 21 Atl. 497; *Linneman v. Moross' Estate*, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528.

²⁶ *EXCHANGE BANK v. RICE*, 107 Mass. 37, 9 Am. Rep. 1; *MARSTON v. BIGELOW*, 150 Mass. 53, 22 N. E. 71, 5 L. R. A. 43.

held by four of the seven judges that he could sue on the promise, as it was considered settled in that state that, where a promise is "made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach."²⁷ In many cases the rule has been declared broadly as thus stated.²⁸

According to the decisions in New York and many other states, however, there must be something more than a mere promise for the benefit of the third person. The promise must be for his benefit,²⁹ and there must be between the promisee and the third person seeking to enforce the promise the relation of debtor and creditor, or some such relation as makes the performance of the promise a satisfaction of some legal or equitable duty owing by the promisee to such third person.³⁰ "It is not sufficient that the performance of the promise may

²⁷ *LAWRENCE v. FOX*, 20 N. Y. 268. See, also, *Schermerhorn v. Vanderheyden*, 1 Johns. 140, 3 Am. Dec. 304; *TODD v. WEBER*, 95 N. Y. 181, 47 Am. Rep. 20; *Stewart v. Trustees*, 2 Denio, 403; *GIFFORD v. CORRIGAN*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508.

²⁸ *BASSETT v. HUGHES*, 43 Wis. 319; *Bristow v. Lane*, 21 Ill. 194; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Mason v. Hall*, 30 Ala. 599; *Brice v. King*, 1 Head (Tenn.) 152; *WOOD v. MORIARTY*, 15 R. I. 518, 9 Atl. 427; *Small v. Schaefer*, 24 Md. 143; *BOHANAN v. POPE*, 42 Me. 93; *Coleman v. Whitney*, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517; *Kaufman v. Bank*, 31 Neb. 661, 48 N. W. 738; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855; *Flint v. Cadenasso*, 64 Cal. 83, 28 Pac. 62; *Hecht v. Caughron*, 46 Ark. 135; *Jones v. Thomas*, 21 Grat. (Va.) 96; *Robbins v. Ayres*, 10 Mo. 538, 47 Am. Dec. 125; *WHITEHEAD v. BURGESS*, 61 N. J. Law, 75, 38 Atl. 802; *Enos v. Sanger*, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862, 65 Am. St. Rep. 38; *Marble Sav. Bank v. Mesarvey*, 101 Iowa, 285, 70 N. W. 198; *Ingram v. Ingram*, 172 Ill. 287, 50 N. E. 198; *Rohman v. Gaiser*, 53 Neb. 474, 73 N. W. 923; *Ransdel v. Moore*, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753; *GORRELL v. WATER SUPPLY CO.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; *Ferris v. Brewing Co.*, 155 Ind. 539, 58 N. E. 701; *Elmer v. Loper*, 66 N. J. Law, 50, 48 Atl. 550. Cf. *Electric Appliance Co. v. Guaranty Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609. That the person for whose benefit a promise is made may sue does not prevent the promisee from also suing. *Steene v. Aylesworth*, 18 Conn. 244; *Merriam v. Lumber Co.*, 23 Minn. 314. But see *Seigman v. Hoffacker*, 57 Md. 321.

²⁹ *Simson v. Brown*, 68 N. Y. 355; *WHEAT v. RICE*, 97 N. Y. 296; *Austin v. Seligman (C. C.)* 18 Fed. 519; *Sayward v. Dexter, Horton & Co.*, 72 Fed. 758, 19 C. C. A. 176; *American Exch. Nat. Bank v. Railroad Co. (C. C.)* 76 Fed. 130; *Greenwood v. Sheldon*, 31 Minn. 254, 17 N. W. 478; *Wright v. Terry*, 23 Fla. 160, 2 South. 6; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Crandall v. Payne*, 154 Ill. 627, 39 N. E. 601; *Walsh v. Featherstone*, 67 Minn. 103, 69 N. W. 811; *School Dist. of Beatrice v. Thomas*, 51 Neb. 740, 71 N. W. 731; *German State Bank v. Light Co.*, 104 Iowa, 717, 74 N. W. 685; *Washburn v. Investment Co.*, 26 Or. 436, 38 Pac. 620; *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899; *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218; *Rowe v. Moon*, 115 Wis. 566, 92 N. W. 263.

³⁰ *DURNHERR v. RAU*, 135 N. Y. 219, 32 N. E. 49; *WHEAT v. RICE*, 97 N. Y. 302; *Lorillard v. Clyde*, 122 N. Y. 498, 25 N. E. 917, 10 L. R. A.

benefit the third person. It must have been entered into for his benefit, or at least such benefit must be the direct result of performance, and so within the contemplation of the parties; and, in addition, the promisee must have a legal interest that the promise be performed in favor of the party claiming performance."³¹

Thus, where a mortgagor conveys the mortgaged premises to a purchaser, who in his deed assumes and agrees to pay the mortgage, it is generally held that the mortgagee may maintain an action against the grantee upon the covenant to pay;³² but if the grantor is not personally bound to pay a mortgage upon the granted premises, as where he has purchased subject to the mortgage without assuming it, his grantee does not by assuming the mortgage become personally liable to the mortgagee.³³ It is very generally held that the promisee can release the promisor from his obligation before the third person for whose benefit the promise was made has assented to and adopted it,³⁴ but not afterwards.³⁵

113; *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731 (but see *BUCHANAN v. TILDEN*, 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454); *Jefferson v. Asch*, 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618; *Union Railway Storage Co. v. McDermott*, 53 Minn. 407, 55 N. W. 606; *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218. And see *Coleman v. Whitney*, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517; *Lovejoy v. Howe*, 55 Minn. 353, 57 N. W. 57; *BARNES v. INSURANCE CO.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438; *Montgomery v. Rief*, 15 Utah, 495, 50 Pac. 623; *German State Bank v. Light Co.*, 104 Iowa, 717, 74 N. W. 685; *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872; *Street v. Goodale*, 77 Mo. App. 318; *Frerking v. Thomas*, 64 Neb. 193, 89 N. W. 1005.

³¹ *DURNHERR v. RAU*, 135 N. Y. 219, 32 N. E. 49.

³¹ *DURNHERR v. RAU*, 135 N. Y. 219, 32 N. E. 49.

³² *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *BAY v. WILLIAMS*, 112 Ill. 91, 54 Am. Rep. 209; *Follansbee v. Johnson*, 28 Minn. 311, 9 N. W. 882; *Flint v. Cadenasso*, 64 Cal. 83, 28 Pac. 62; *Stephenson v. Elliott*, 53 Kan. 550, 36 Pac. 980; *Starbird v. Cranston*, 24 Colo. 20, 48 Pac. 652; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; *Kehoe v. Patton*, 23 R. I. 360, 50 Atl. 655. See note 35, *infra*.

³³ *VROOMAN v. TURNER*, 69 N. Y. 280, 25 Am. Rep. 195; *Brown v. Stillman*, 43 Minn. 126, 45 N. W. 2; *Nelson v. Rogers*, 47 Minn. 103, 49 N. W. 526; *Young Men's Christian Ass'n v. Croft*, 34 Or. 106, 55 Pac. 439, 75 Am. St. Rep. 568; *Eakin v. Shultz*, 61 N. J. Eq. 156, 47 Atl. 274. Contra, *Marble Sav. Bank v. Mesarvey*, 101 Iowa, 285, 70 N. W. 198; *Enos v. Sanger*, 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862, 65 Am. St. Rep. 38.

³⁴ *KELLY v. ROBERTS*, 40 N. Y. 432; *Brewer v. Mauerer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Gilbert v. Sanderson*, 56 Iowa, 349, 9 N. W. 293; *Comley v. Dazian*, 114 N. Y. 161, 21 N. E. 135.

³⁵ *BASSETT v. HUGHES*, 43 Wis. 319; *GIFFORD v. CORRIGAN*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; *New York Life Ins. Co. v. Aitkin*, 125 N. Y. 660, 26 N. E. 732; *Dodge's Adm'r v. Moss*, 82 Ky. 441; *Etscheid v. Baker*, 112 Wis. 129, 88 N. W. 52. And see *Clark v. Fisk*, 9 Utah, 94, 33 Pac. 248. But some courts hold that the promise invests the third person with an immediate right, which the promisee cannot

Same—Contracts under Seal.

In some of the states it is held that the doctrine allowing suit on a contract by a third person for whose benefit it is made applies as well to covenants or promises under seal as to simple contracts.³⁶ In other states the contrary has been held, on the ground that assumpsit will not lie on a covenant under seal, and that it is only an action of assumpsit that will lie by a person for whose benefit a promise has been made to another.³⁷

Same—Statutory Exceptions

By statute, in many of the states,—no doubt in all the code states,—it is expressly provided that every action must be prosecuted in the name of the real party in interest, except in certain cases; and under such a provision it has been held that the person for whose benefit a contract is made may sue thereon.³⁸

Action by Third Party for Many Joint Contractors.

If a person and a group of persons, such as an unincorporated society should enter into a contract, it might be convenient that a third person

release. *BAY v. WILLIAMS*, 112 Ill. 91, 54 Am. Rep. 209; *Starbird v. Cranston*, 24 Colo. 20, 48 Pac. 652; *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N. W. 440, 61 L. R. A. 509. In states which do not recognize the right of a third person for whose benefit the promise is made to enforce the contract, he may sometimes avail himself of the promise in equity by subrogation to the rights of the promisee, as in the case of a mortgagee where a grantee of a mortgagor has assumed the mortgage. Such is the rule in the federal courts. *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667; *Knapp v. Insurance Co.*, 85 Fed. 329, 29 C. C. A. 171, 40 L. R. A. 861. Here the rights of the mortgagee against the grantee are necessarily defeated if the grantor releases the grantee from his covenant, unless the release is in fraud of creditors. See *Jones, Mtg.* § 763; *Crowell v. Hospital*, 27 N. J. Eq. 650; *Youngs v. Public Schools*, 31 N. J. Eq. 290; *O'Neill v. Clark*, 33 N. J. Eq. 444.

³⁶ *BASSETT v. HUGHES*, 43 Wis. 319. And see *GIFFORD v. CORRIGAN*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508; *Coster v. City of Albany*, 43 N. Y. 399; *Riordan v. Presbyterian Church*, 6 Misc. Rep. 84, 26 N. Y. Supp. 38; *Kimball v. Noyes*, 17 Wis. 695; *McDowell v. Leav*, 35 Wis. 171; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; cf. *Harms v. McCormick*, 132 Ill. 104, 22 N. E. 511.

³⁷ *Hinkley v. Fowler*, 15 Me. 285. And see *Cocks v. Varney*, 45 N. J. Eq. 72, 17 Atl. 108; *Seigman v. Hoffacker*, 57 Md. 321; *Robbins v. Ayres*, 10 Mo. 538, 47 Am. Dec. 125; *Baldwin v. Emery*, 89 Me. 496, 36 Atl. 994. Cf. *Styles v. F. R. Long Co.*, 67 N. J. Law, 413, 51 Atl. 710.

³⁸ *Bliss*, Code Pl. § 241; *Pomeroy*, Rem. & Rem. R. § 139. See *Paducah Lumber Co. v. Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 7 L. R. A. 77, 25 Am. St. Rep. 536; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Stevens v. Flannagan*, 131 Ind. 122, 30 N. E. 898; *Starbird v. Cranston*, 24 Colo. 20, 48 Pac. 652. But it seems that a third person must establish a legal, or at least an equitable, right to enforce the contract independently of this provision. Ante, p. 356, and cases cited in note 30; *Anson, Contr.* (8th Ed.) 282, note by Prof. Hufsch. In some states it is enacted that if a promise is made

should be able to sue on behalf of the group. The general rule, however, that a contract cannot confer rights on persons not parties to it, applies. In a case in which the managers of an association, under powers of attorney executed by the members, sued upon a contract entered into by the association, it was held that they could not maintain the action, "for the simple reason * * * that the proper person to bring an action is the person whose right has been violated." "This is an attempt," it was further said, "to do what has been frequently, but fruitlessly, attempted before, viz. to get rid of the difficulty of a large number of people suing in their own names,—to appoint a public officer without obtaining an act of parliament or a charter of incorporation."³⁹

In some of the states, statutes have been enacted expressly providing that where the parties are very numerous, and it would be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.⁴⁰

ASSIGNMENT OF CONTRACTS—IN GENERAL.

193. Under some circumstances, a person not a party to a contract may take the place of one of the parties. This substitution is called assignment of the contract. It may be either

- (a) By the voluntary act of the parties, or**
- (b) By operation of law.**

We have just seen that, subject to certain exceptions, a contract cannot affect any but the parties to it, either by imposing liabilities or conferring rights on them. The original parties to a contract, however, may, under certain circumstances, drop out, and others may take their places. The operation by which this change in the contractual relation is effected is termed an assignment of the contract.

for the sole benefit of a third person, he may sue in his own name. See *City of Newport News v. Potter*, 122 Fed. 321, 58 C. C. A. 483.

³⁹ *Gray v. Pearson*, L. R. 5 C. P. 508. See *Anson, Cont.* (8th Ed.) 230.

⁴⁰ *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692; *Gibson v. Trust Co.*, 58 Hun, 443, 12 N. Y. Supp. 444; *Gieske v. Anderson*, 77 Cal. 247, 19 Pac. 421; *Platt v. Colvin*, 50 Ohio St. 703, 36 N. E. 735; *Alexander v. Gish*, 88 Ky. 13, 9 S. W. 801; *Lilly v. Tobbein* (Mo. Sup.) 13 S. W. 1060.

SAME—ASSIGNMENT OF LIABILITIES BY ACT OF PARTIES.**194. A person cannot assign his liabilities under a contract.**

APPARENT EXCEPTIONS—(a) He may so assign with the consent of the other party to the contract.

(b) In contracts to do work involving no personal skill or personal qualifications, the party may have the work done by another, but he remains liable if it is not properly done.

(c) When an interest in land is transferred, certain liabilities attaching to the enjoyment of the interest pass with it.

A person cannot assign his liabilities under a contract, or, to put the matter from the point of view of the other party to the contract, a person cannot be compelled to accept performance of the contract from a person who was not originally a party to it. The reason for the rule lies not only in the right of a person to know to whom he is to look for the satisfaction of his rights under a contract, but in his right "to the benefit which he contemplates from the character, credit, and substance of the person with whom he contracts."⁴¹

The rule is well illustrated by a case in which one Sharpe let a carriage to the defendant, at a yearly rent, for five years, undertaking to paint it every year and keep it in repair. One Robson was, in fact, the partner of Sharpe, but the defendant contracted with Sharpe alone. After three years, Sharpe retired from business, and the defendant was informed that Robson was thenceforth answerable for the repair of the carriage and would receive the rent. The defendant refused to accept the substitution, and it was held that he could not be sued upon the contract. "The defendant," it was said, "may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe. * * * The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone, and not with any other person."⁴²

⁴¹ *Humble v. Hunter*, 12 Q. B. 310. And see *ARKANSAS VAL. SMELTING CO. v. BELDEN MIN. CO.*, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; *Chapin v. Longworth*, 31 Ohio St. 421; *Rappleye v. Seeder Co.*, 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139; *Burger v. Rice*, 3 Ind. 125; *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Griswold v. Railroad Co.*, 18 Mo. App. 52; *Lansden v. McCarthy*, 45 Mo. 106; *Palo Pinto Co. v. Gano*, 60 Tex. 249; *Donelson v. Polk*, 61 Md. 501, 2 Atl. 824; *Stewart v. Railroad Co.*, 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; *Sprinkle v. Trulove*, 22 Ind. App. 577, 54 N. E. 461; post, p. 364, and cases there cited.

⁴² *Robson v. Drummond*, 2 Barn. & Adol. 303. Cf. *BRITISH WAGGON*

Exceptions to the Rule.

The exceptions to this rule are apparent rather than real. A person may assign the liabilities imposed upon him by a contract which he has made if the other party to the contract consents. This, however, is, in effect, a new contract. It is a rescission by agreement of the old contract, and the substitution of a new one, in which the same acts are to be performed by different parties.

Another apparent exception is in this, namely, that if a person undertakes to do work for another which requires no special skill, and he has not been selected for the work with reference to any personal qualifications, he may have the work done by some equally competent third person. This, however, is not an assignment of his liabilities, for he does not cease to be liable if the work is not done in accordance with the contract.⁴³

The third apparent exception is where an interest in land is transferred. In such case, liabilities attaching to the enjoyment of the interest pass with it. This will be discussed presently.

SAME—ASSIGNMENT OF RIGHTS BY ACT OF PARTIES.

195. AT COMMON LAW. Rights arising out of a contract cannot be assigned at common law except—

EXCEPTIONS—(a) By an agreement between the original parties and the intended assignee, which is subject to all the rules for the formation of a valid contract.

(b) By the rules of the law merchant in the case of negotiable instruments.

(c) An assignment in equity is so far recognized at common law as to permit the assignee to sue thereon in the name of the assignor or his representatives.

196. IN EQUITY. A chose in action, or rights under a contract, may be assigned in equity whenever the contract is not for exclusively personal services, and does not involve personal credit, trust, and confidence. But—

CONDITIONS—(a) Notice is necessary to bind the debtor or person liable.

(b) The assignee takes subject to all such defenses as would have prevailed against the assignor.

197. BY STATUTE. There are statutes in most states allowing the assignment of choses in action, and a suit at law by the assignee in his own name.

CO. v. LEA, 5 Q. B. Div. 149. And see Hand v. Evans Marble Co., 88 Md. 226, 40 Atl. 899.

⁴³ BRITISH WAGGON CO. v. LEA, 5 Q. B. Div. 149; ROCHESTER LANTERN CO. v. PRESS CO., 135 N. Y. 209, 31 N. E. 1018.

At common law, apart from the customs of the law merchant, the rights or benefits arising out of a contract, or, as it is generally termed, a chose in action, cannot be assigned so as to entitle the assignee to sue upon it in his own name.⁴⁴ This is a settled and inflexible rule, and its effect cannot be avoided by stipulations of the parties, as by an express provision in the contract to the effect that it may be assigned, provided, of course, the stipulation does not render the contract a negotiable instrument, and so bring it within the law merchant.⁴⁵

As will be seen, however, the assignment creates rights in equity, and the common law so far takes cognizance of these equitable rights as to permit the assignee to use the name of the assignor, or his representative if the assignor be dead, as trustee for the assignee, so that he may sue on the contract in their name. An equitable assignment of a chose in action is in the nature of a declaration of trust by the party having the legal right, and an agreement on his part to permit the assignee to make use of his name to enforce it.⁴⁶

Strictly speaking, the only mode by which the rights under a contract can be really transferred at law is, not by assignment at all, but by means of a substituted agreement. If A. owes B. \$100, and B. owes C. \$100, it may be agreed between all three that A. shall pay C. instead of paying B., so that B. thereby terminates his legal relations with both parties. In such case the consideration for A.'s promise is the discharge of B.; the consideration for B.'s discharge of A. is the extinguishment of his debt to C.; the consideration for C.'s promise is the substitution of A.'s liability for that of B. This is known as a "novation."⁴⁷ To effect such a change of relations, there must be ascertained sums due from A. to B., and from B. to C.; and it is further essential that there shall be a definite agreement between the parties, for it is the promise of each which is the consideration for the promise of the others. It would not be enough for A. to say to C.,

⁴⁴ Leake, Cont. 601; Co. Litt. 214a, 232b; 2 Bl. Comm. 442; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Hay v. Green, 12 Cush. (Mass.) 282; Hunt v. Mann, 132 Mass. 53; GLENN v. MARBURY, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790. "The origin of the rule was attributed by Coke to the 'wisdom and policy of the founders of our law' in discouraging maintenance and litigation; but there can be little or no doubt that it was in truth a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor." Pol. Cont. 206.

⁴⁵ Coolidge v. Ruggles, 15 Mass. 387; Weidler v. Kauffman, 14 Ohio, 455. Legro v. Staples, 16 Me. 252; Little v. Bank, 2 Hill (N. Y.) 425, 7 Hill (N. Y.) 359; People v. Gray, 23 Cal. 125.

⁴⁶ Leake, Cont. 602; WELCH v. MANDEVILLE, 1 Wheat. 233, 4 L. Ed. 79; Halloran v. Whitcomb, 43 Vt. 306; Fay v. Guynon, 131 Mass. 31; Frear v. Everton, 20 Johns. (N. Y.) 142; PARSONS v. WOODWARD, 2 Zab. (N. J.) 196; McWilliam v. Webb, 32 Iowa, 577; Webb v. Steele, 13 N. H. 230.

⁴⁷ Post, p. 422.

"I will pay you instead of B.," and to afterwards suggest the arrangement to B., and receive his assent.⁴⁸ Nor would it be enough for B. to authorize A. in writing to pay to C., and for A. to acknowledge the paper in writing.⁴⁹ In neither of these cases would there be such an agreement between all three persons as to amount to a discharge by B. of the debt due by him to A. There would, therefore, be no consideration for A.'s promise to pay C., so as to support an action by C. against him. In an action under the circumstances of the second case mentioned above by C. against A. it was said: "There are two legal principles which, so far as I know, have never been departed from. One is that, at common law, a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and, that being the law, it is perfectly clear that B. could not assign to the plaintiff the debt due from the defendant to him. * * * The other principle which would be infringed by allowing this action to be maintained is the rule of law that a bare promise cannot be the foundation of an action."⁵⁰

Same—Recognition of Equitable Assignment in Law.

Courts of common law recognize the validity of equitable assignments for other purposes than to permit the assignee to sue at law in the name of the assignor. An assignment of a chose in action has always been held a good consideration for a promise.⁵¹ Thus, the benefit of a contract may be sold, and the assignment of the contract forms a valuable consideration for a promise to pay the price, which may be recovered in an action at law.⁵² The forbearance by the assignee of a debt to sue the debtor is a good consideration for an express promise by the debtor to pay the assignee, and on this promise the assignee may maintain an action in his own name.⁵³ He must sue on the debtor's promise to him, and not on the promise to the assignor assigned to him.

Rule in Equity.

Equity permits the assignment of certain contracts subject to certain conditions. As a rule, however, the assignee of a chose in action must seek his remedy at law, by an action in the name of his assignor, and cannot, merely because his interest is an equitable one, bring a

⁴⁸ Caxon v. Chadley, 3 Barn. & C. 591.

⁴⁹ LIVERSIDGE v. BROADBENT, 4 Hurl. & N. 603.

⁵⁰ LIVERSIDGE v. BROADBENT, 4 Hurl. & N. 603.

⁵¹ Leake, Cont. 605; Master v. Miller, 4 Term R. 341; Skinner v. Somes, 14 Mass. 107.

⁵² Price v. Seaman, 4 Barn. & C. 525.

⁵³ MORTON v. BURN, 7 Adol. & E. 19; Fenner v. Mears, 2 W. Bl. 1269; Skinner v. Somes, 14 Mass. 107; Crocker v. Whitney, 10 Mass. 316; JESSEL v. INSURANCE CO., 3 Hill (N. Y.) 88; COMPTON v. JONES, 4 Cow. (N. Y.) 13; Onion v. Paul, 1 Har. & J. (Md.) 114.

suit in equity for the recovery of his demand.⁵⁴ "A court of equity will not entertain a bill by the assignee of a strictly legal right, merely because he cannot bring an action at law in his own name, nor unless it appears that the assignor prevents and prohibits such an action from being brought in his name, or that an action so brought would not afford an adequate remedy at law."⁵⁵ When, however, a suit in equity is maintainable, it may be maintained by the assignee in his own name.

As we shall presently see, there are statutes in most of the states authorizing the assignment of choses in action, so as to give the assignee a right to sue at law in his own name. Where the statute is general, or does not provide otherwise, it is held that it allows such assignments at law as were formerly allowed in equity, and leaves them subject at law to the same rules as governed them in equity. What we shall now say, therefore, in regard to assignments in equity, will generally apply to assignments at law authorized by these statutes.

Same—What is Assignable.

It may be said generally that anything which directly or indirectly involves a right of property is assignable,⁵⁶ with the exception that rights when coupled with liabilities under an executory contract for personal services, or under contracts otherwise involving personal credit, trust, or confidence cannot be assigned.⁵⁷ Such things pass to

⁵⁴ CARTER v. INSURANCE CO., 1 Johns. Ch. (N. Y.) 463; Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271; New York Guaranty & Indemnity Co. v. Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484; Adair v. Winchester, 7 Gill & J. (Md.) 114; Smiley v. Bell, Mart. & Y. (Tenn.) 378, 17 Am. Dec. 813; Moseley v. Boush, 4 Rand. (Va.) 392.

⁵⁵ Walker v. Brooks, 125 Mass. 241. See Smith v. Bates Machine Co., 182 Ill. 166, 55 N. E. 69.

⁵⁶ Mulhall v. Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414; Harbord v. Cooper, 43 Minn. 466, 45 N. W. 860; Dayton v. Fargo, 45 Mich. 153, 7 N. W. 758; Grant v. Ludlow, 8 Ohio St. 1; Burkett v. Moses, 11 Rich. Law (S. C.) 432; Louisville R. Co. v. Goodbar, 88 Ind. 213; La Rue v. Groezinger, 84 Cal. 281, 24 Pac. 42, 45, 18 Am. St. Rep. 179; Francisco v. Smith, 143 N. Y. 488, 38 N. E. 980; Up River Ice Co. v. Denler, 114 Mich. 296, 72 N. W. 157, 68 Am. St. Rep. 480; Fleekenstein Bros. Co. v. Fleekenstein (N. J. Ch.) 53 Atl. 1043.

⁵⁷ Robson v. Drummond, 2 Barn. & Adol. 303; BRITISH WAGGON CO. v. LEA, 5 Q. B. Div. 149; Jaeger's Sanitary Woolen Supply Co. v. Walker, 77 L. T. (N. S.) 180; Bethlehem v. Annis, 40 N. H. 34, 77 Am. Dec. 700; Rappleye v. Seeder Co., 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139; Sloan v. Williams, 138 Ill. 43, 27 N. E. 531, 12 L. R. A. 496; Joslyn v. Parlin, 54 Vt. 670; Chapin v. Longworth, 31 Ohio St. 421; DEVLIN v. CITY OF NEW YORK, 63 N. Y. S.; Hardy Implement Co. v. South Bend Iron Works, 129 Mo. 222, 31 S. W. 599; Edison v. Balka, 111 Mich. 235, 69 N. W. 499; Eastern Advertising Co. v. McGow, 89 Md. 72, 42 Atl. 923; Zetterlund v. Texas Land & Coal Co., 55 Neb. 355, 75 N. W. 860; Campbell v. Board of Com'rs, 64 Kan. 376, 67 Pac. 866. A contract by a publisher with an author to publish a

the personal representatives of the party liable or entitled, and, as we shall see, are thus assigned by operation of law; and it has been said that "the power to assign and to transmit to personal representatives are convertible propositions."⁵⁸ A person who has made a contract to render personal services cannot assign his right to render such services, but he can assign his right to receive pay for them when rendered by him; and so, it seems, a man can assign the money to become due under any contract.⁵⁹

work has been held not assignable by the publisher without the author's consent, because of the personal trust placed in the publisher by the author. *Stevens v. Benning*, 1 Kay & J. 168; *Gibson v. Carruthers*, 8 Mees. & W. 321, at page 343. And see *Griffith v. Tower Pub. Co.* [1897] 1 Ch. 21. A contract for the sale of goods on credit cannot be assigned by the vendee without the vendor's consent. *ARKANSAS VALLEY SMELTING CO. v. BELDEN MIN. CO.*, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246. "When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised, and the obligations performed, by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract." *Board of Com'rs of Delaware County v. Diebold Safe & Lock Co.*, 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674, per Gray, J. And see *Burck v. Taylor*, 152 U. S. 634, 12 Sup. Ct. 396, 38 L. Ed. 578. If the contract prohibits assignment, an assignee succeeds to no rights. *Mueller v. Northwestern University*, 195 Ill. 263, 63 N. E. 110, 88 Am. St. Rep. 194.

⁵⁸ *Zabriskie v. Smith*, 13 N. Y. 333; *Byxhie v. Wood*, 24 N. Y. 607; *DEVLIN v. CITY OF NEW YORK*, 63 N. Y. 8; *Edmunds v. Illinois Cent. Ry.* (C. C.) 80 Fed. 78. But see dictum in *ARKANSAS VALLEY SMELTING CO. v. BELDEN MIN. CO.*, 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246.

⁵⁹ *DEVLIN v. CITY OF NEW YORK*, 63 N. Y. 8; *Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220; *Weed v. Jewett*, 2 Metc. (Mass.) 608, 37 Am. Dec. 115; *Brackett v. Blake*, 7 Metc. (Mass.) 335, 41 Am. Dec. 442; *Emery v. Lawrence*, 8 Cush. (Mass.) 151; *Garland v. Harrington*, 51 N. H. 409; *Shaffer v. Mining Co.*, 55 Md. 74; *Hawley v. Bristol*, 39 Conn. 26; *Greene v. Bartholomew*, 34 Ind. 235; *Metcalf v. Kincaid*, 87 Iowa, 443, 54 N. W. 867, 43 Am. St. Rep. 391; *Bates v. Lumber Co.*, 56 Minn. 14, 57 N. W. 218; *Galey v. Mellon*, 172 Pa. 443, 33 Atl. 560; *Rodgers v. Torrent*, 111 Mich. 680, 70 N. W. 335. One not under contract or existing employment cannot, at law, make a valid assignment of wages he may earn in the future. It is the mere possibility of a subsequent acquisition of property, which is too uncertain to be the basis of assignment. *Mulhall v. Quinn*, 1 Gray (Mass.) 105, 61 Am. Dec. 414; *Hamilton v. Rogers*, 8 Md. 301; *Lehigh Valley R. Co. v. Woodring*, 116 Pa. 513, 9 Atl. 58; *O'KEEFE v. ALLEN*, 20 R. I. 414, 39 Atl. 752, 78 Am. St. Rep. 884. A thing to be assignable, at law, must have at least a potential existence. *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; *Moody v. Wright*, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; *Hassie v. Congregation*, 35 Cal. 378; *Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 646; *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85. A man could not assign money to become due under a policy not yet issued, but, after issuance, he may do so before any loss. *Bergson v. Insurance Co.*, 38 Cal. 541. Future rent under an existing lease. *Demarest v. Willard*, 8 Cow. (N. Y.) 206. A contract between an insurance company and its agent, by which the latter is entitled to

Same—Partial Assignment.

A debtor has a right to pay his debt as a whole, and cannot without his consent be subjected to separate actions by different persons. A creditor, therefore, cannot, at law, assign a part of his claim without the debtor's consent.⁶⁰ It is generally held, however, that the rule only applies where the assignment is sought to be enforced at law in the name of the assignor, and that in equity a partial assignment is good, for the reason that in equity the assignor, as well as the debtor, may be joined, and the whole controversy may be determined in one suit.⁶¹

Same—Form of Assignment.

No particular form for an assignment is necessary, unless it is required by statute. In the absence of a statute an equitable assignment may be made without any deed or writing, by any words or acts show-

receive commissions on renewal premiums, to accrue annually for a given period in the future, is assignable by the agent, as the contract is not dependent upon any contingency, though the profits arising under it are. *Knevals v. Blauvelt*, 82 Me. 458, 19 Atl. 818. But equity will uphold an assignment of a thing resting in mere possibility, as of wages to be earned in the future not under an existing contract or employment, if based on a valuable consideration, the assignment taking effect when the thing comes into existence. *FIELD v. MAYOR*, 6 N. Y. 179, 57 Am. Dec. 435; *Edwards v. Peterson*, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; *Patterson v. Caldwell*, 124 Pa. 455, 17 Atl. 18, 10 Am. St. Rep. 598.

⁶⁰ *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87; *CARTER v. NICHOLS*, 58 Vt. 553, 5 Atl. 197; *Getchell v. Maney*, 69 Me. 442; *Beardsley v. Morgner*, 73 Mo. 22; *Tripp v. Brownell*, 12 Cush. (Mass.) at page 382; *Gibson v. Cooke*, 20 Pick. (Mass.) 15, 32 Am. Dec. 194; *Milroy v. Iron Co.*, 43 Mich. 231, 5 N. W. 287; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *Philadelphia's Appeal*, 86 Pa. 179; *Dean v. St. Paul & D. R.*, 53 Minn. 504, 55 N. W. 628; *Kansas City, M. & B. R. v. Robertson*, 109 Ala. 296, 19 South. 432; *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426; *Rivers v. A. & C. Wright & Co.*, 117 Ga. 81, 43 S. E. 499. Where a contract for work provides for payment in installments, each installment is a separate demand, and may be assigned. *Adler v. Railroad Co.*, 92 Mo. 242, 4 S. W. 917.

⁶¹ *National Exch. Bank v. McLoon*, 73 Me. 498; *Canty v. Latterner*, 31 Minn. 239, 17 N. W. 385; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *FIELD v. CITY OF NEW YORK*, 6 N. Y. 179, 57 Am. Dec. 435; *RISLEY v. BANK*, 83 N. Y. 318, at page 329, 38 Am. Rep. 421; *Daniels v. Meinhard*, 53 Ga. 359; *Fordyce v. Nelson*, 91 Ind. 447; *Harris Co. v. Campbell*, 68 Tex. 22, 3 S. W. 243, 2 Am. St. Rep. 467; *Etheridge v. Vernoy*, 74 N. C. 800; *Bower v. Stone Co.*, 30 N. J. Eq. 171; *County of Des Moines v. Hinkley*, 62 Iowa, 637, 17 N. W. 915; *Schilling v. Mullen*, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; *Warren v. Bank*, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; *The Elmbank (D. C.)* 72 Fed. 610; *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707. *Contra*, *Burnett v. Crandall*, 63 Mo. 410; *Gardner v. Smith*, 5 Heisk. (Tenn.) 256. Some cases maintain that consent of the debtor is necessary even in equity. *Story, J.*, in *Mandeville v. Welch*, 5 Wheat. 277, 5 L. Ed. 87. See *JAMES v. NEWTON*, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; *Kingsbury v. Burrill*, 151 Mass. 199, 24 N. E. 36.

ing a clear intention to assign.⁶² An order made by a creditor on his debtor to pay the debt to another would amount to an equitable assignment of the debt to the person in whose favor it is made or to whom it is given.⁶³ An assignment may be conditional, or as security, as well as absolute.⁶⁴

By statute in some of the states, allowing assignments of choses in action at law, and suit by the assignee in his own name, it is required that the assignment shall be in writing, signed by the assignor or his agent. If it is not in such a form, it is only an equitable assignment, and suit, if in the assignee's name, must be brought in equity, or, if suit is brought at law, it must be in the name of the assignor.⁶⁵

Same—Notice of Assignment.

The assignment is complete as between the assignor and the assignee, or those standing in their shoes and representing them, without any notice to the debtor or person liable;⁶⁶ but it will not bind the debtor until he has received notice of it.⁶⁷ A person liable under a contract

⁶² Leake, Cont. 603; ROW v. DAWSON, 1 Ves. Sr. 331; Heath v. Hall, 4 Taunt. 326; Bower v. Stone Co., 30 N. J. Eq. 171; Tingle v. Fisher, 20 W. Va. 497; Shannon v. City of Hoboken, 37 N. J. Eq. 123; Crane v. Gough, 4 Md. 316; Watson v. Bagaley, 12 Pa. 164, 51 Am. Dec. 595; Bank of Commerce v. Bogy, 44 Mo. 13, 100 Am. Dec. 247; Tone v. Shankland, 110 Iowa, 525, 81 N. W. 789. It is said that an assignment will not be supported unless consideration has been given by the assignee. Anson, Cont. (8th Ed.) 238. But the debtor cannot defend on the ground that the assignment was without consideration. Coe v. Hinkley, 109 Mich. 608, 67 N. W. 915; Anderson v. Reardon, 46 Minn. 185, 48 N. W. 777; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; Forsyth v. Ryan (Colo. App.) 68 Pac. 1055; Henderson v. Railway Co. (Mich.) 91 N. W. 630. But see Waterman v. Merrow, 94 Me. 237, 47 Atl. 157. Want of consideration may affect rights of assignee as against assignor's creditors. In re Doringh, 20 R. I. 459, 40 Atl. 4.

⁶³ Story, Eq. Jur. § 1044; Mandeville v. Welch, 5 Wheat. 285, 5 L. Ed. 87; Switzer v. Noffsinger, 82 Va. 518; Wilson v. Carson, 12 Md. 54.

⁶⁴ Draper v. Fletcher, 26 Mich. 154; Herbstreit v. Beckwith, 35 Mich. 93; Gill v. Weller, 52 Md. 8; Hunting v. Emmart, 55 Md. 265. An assignment may be illegal and contrary to public policy (ante, pp. 284, 299).

⁶⁵ Tradesmen's Nat. Bank v. Green, 57 Md. 602; Mutual Life Ins. Co. v. Watson (C. C.) 30 Fed. 653 (Georgia statute); Chamberlin v. Gilman, 10 Colo. 94, 14 Pac. 107.

⁶⁶ Muir v. Schenck, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; Wood v. Partridge, 11 Mass. 488; Thayer v. Daniels, 113 Mass. 129; Burn v. Carvalho, 4 Mlyne & C. 690; Bishop v. Holcomb, 10 Conn. 444; Kafes v. McPherson (N. J. Ch.) 32 Atl. 710; Marsh v. Garney, 69 N. H. 236, 45 Atl. 745.

⁶⁷ Stebbins v. Bruce, 80 Va. 389; Fraley's Appeal, 76 Pa. 42; Bostwick v. Bryant, 113 Ind. 448, 16 N. E. 378; Richards v. Griggs, 16 Mo. 416, 57 Am. Dec. 240; Winberry v. Koonce, 83 N. C. 351; Porter v. Dunlap, 17 Ohio St. 591; Shade v. Creviston, 93 Ind. 591. In case of bankruptcy of the debtor before notice, it would pass to his assignees in bankruptcy. Ryall v. Rowles, 1 Ves. Sr. 348; Dean v. James, 1 Adol. & E. 809. Otherwise where notice has been received before bankruptcy. CROWFOOT v. GURNEY, 9 Bing. 372; Hutchinson v. Heyworth, 9 Adol. & E. 375.

has a right to know to whom his liability is due, and therefore, if he receives no notice that it is due to another than the party with whom he originally contracted, and pays the latter, he is entitled to credit for the payment.⁶⁸ If, for instance, a mortgage is assigned by the mortgagee without notice to the mortgagor, and the mortgagor afterwards pays to the mortgagee, the payment is good as against a subsequent claim by the assignee.⁶⁹ The reason of the rule has been thus stated: "The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a court of equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the court has therefore required notice to be given to the debtor of the assignment in order to perfect the title of the assignee."⁷⁰

The notice need not be given in any formal manner, provided it is such as to inform the debtor of the assignment.⁷¹ After notice of the assignment, he cannot refuse to be bound by it;⁷² and a payment by him to the original debtor will not discharge the debt.⁷³

Same—Title of Assignee.

A person cannot acquire title to a chose in action from one who has himself no title to it. And if a man takes an assignment of a chose in action, he takes his chance as to the exact position in which the party giving it stands. In other words, the assignee of a chose in

⁶⁸ Robinson v. Marshall, 11 Md. 251.

⁶⁹ Williams v. Sorrell, 4 Ves. 389; Van Keuren v. Corkins, 66 N. Y. 77.

⁷⁰ Stocks v. Dobson, 4 De Gex, M. & G. 15.

⁷¹ Smith v. Smith, 2 Crompt. & M. 231; Anderson v. Van Alen, 12 Johns. (N. Y.) 343; Meux v. Bell, 1 Hare, 73; Edwards v. Scott, 1 Man. & G. 962; HEERMANS v. ELLSWORTH, 64 N. Y. 159; Tibbits v. George, 5 Adol. & E. 107; Riley v. Taber, 9 Gray (Mass.) 372; Barron v. Porter, 44 Vt. 587; Dale v. Kimpton, 46 Vt. 76; Bean v. Simpson, 16 Me. 49; Kellogg v. Krauser, 14 Serg. & R. (Pa.) 137, 16 Am. Dec. 480; Guthrie v. Bashline, 25 Pa. 80; Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426.

⁷² Tibbits v. George, 5 Adol. & E. 107; BRILL v. TUTTLE, 81 N. Y. 454, 37 Am. Rep. 515; Switzer v. Noffsinger, 82 Va. 518; Savage v. Gregg, 150 Ill. 161, 37 N. E. 312.

⁷³ BRILL v. TUTTLE, 81 N. Y. 454, 37 Am. Rep. 515; BRICE v. BANNISTER, 3 Q. B. Div. 569; Hall v. Insurance Co., 111 Mass. 53, 15 Am. Rep. 1; Whitman v. Arms Co., 55 Conn. 247, 10 Atl. 571; Shriner v. Lamborn, 12 Md. 170; Kitzinger v. Beck, 4 Colo. App. 206, 35 Pac. 278; Schilling v. Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; Ferguson v. Davidson, 147 Mo. 664, 49 S. W. 859.

action takes it subject to all the equities of the debtor against the assignor existing at the time he received notice of the assignment.⁷⁴ If the debtor, for instance, has a right of set-off against the debt at the time of the assignment, he may enforce the right as against the assignee;⁷⁵ and, as we have already seen, he may enforce a right of set-off acquired after the assignment, but before he received notice of it.⁷⁶ Since, however, notice thereof completes the assignment as against the debtor, he cannot set off a claim afterwards acquired.⁷⁷ So, also, if a party is induced to enter into a contract by fraud, and the fraudulent party assigns his interest in the contract, the party defrauded may have the contract set aside in equity in spite of the assignment, and

⁷⁴ *Crouch v. Credit Foncier*, L. R. 8 Q. B. 380; *Mangles v. Dixon*, 3 H. L. Cas. 702, 735; *Clute v. Robison*, 2 Johns. (N. Y.) 595; *Littlefield v. Bank*, 97 N. Y. 581; *Callanan v. Edwards*, 32 N. Y. 483; *Kleeman v. Frisbie*, 63 Ill. 482; *Buckner v. Smith*, 1 Wash. (Va.) 296, 1 Am. Dec. 463; *Kamena v. Huelbig*, 23 N. J. Eq. 78; *Spinning v. Sullivan*, 48 Mich. 5, 11 N. W. 758; *Edson v. Gates*, 44 Mich. 253, 6 N. W. 645; *Barney v. Grover*, 28 Vt. 391; *Martin v. Richardson*, 68 N. C. 255; *Lane v. Smith*, 103 Pa. 415; *Willis v. Twambly*, 13 Mass. 204; *Shade v. Creviston*, 93 Ind. 591; *Goldsborough v. Cradie*, 28 Md. 477; *Boardman v. Hayne*, 29 Iowa, 339; *Russell v. Kirkbride*, 62 Tex. 455; *Hill v. McPherson*, 15 Mo. 204, 55 Am. Dec. 142; *Third Nat. Bank v. Railroad Co.*, 114 Ga. 890, 40 S. E. 1016. If the debtor does anything to mislead the assignee, he may be estopped; and in this way the assignee may get a better title than his assignor. *Holbrook v. Burt*, 22 Pick. (Mass.) 546; *Kemp's Ex'x v. McPherson*, 7 Har. & J. (Md.) 320; *Johnston v. Insurance Co.*, 39 Md. 233; *Woodson v. Barrett*, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612; *Scott v. Sadler*, 52 Pa. 211; *Buckner v. Smith*, 1 Wash. (Va.) 296, 1 Am. Dec. 463; *Boardman v. Hayne*, 29 Iowa, 339. Equities which may be interposed as defenses against the assignee of a nonnegotiable instrument are only such as are inherent in the contract evidenced by the instrument, and which exist at the time of the assignment. *Merchants' Bank v. Weill*, 163 N. Y. 486, 57 N. E. 749, 79 Am. St. Rep. 605.

⁷⁵ *Story*, Eq. Jur. § 1047; *Cavendish v. Greaves*, 24 Beav. 163; *Massachusetts Loan & Trust Co. v. Welch*, 47 Minn. 183, 49 N. W. 740; *Greene v. Hatch*, 12 Mass. 195; *Zabriskie v. Railroad Co.*, 131 N. Y. 72, 29 N. E. 1006; *Wood v. City of New York*, 73 N. Y. 556; *McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. 898; *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *Hooper v. Brundage*, 22 Me. 460; *Hunt v. Shackelford*, 55 Miss. 94; *Sanborn v. Little*, 3 N. H. 539; *Littlefield v. Bank*, 97 N. Y. 581; *Jack v. Davis*, 29 Ga. 219. An unmatured debt, existing at the time of the assignment, cannot be set off. *Roberts v. Carter*, 38 N. Y. 107; *Chambliss v. Matthews*, 57 Miss. 306; *Backus v. Spaulding*, 129 Mass. 234; *Adams v. Rodarmel*, 19 Ind. 339; *Graham v. Tilford*, 1 Metc. (Ky.) 112; *Follett v. Buyer*, 4 Ohio St. 586.

⁷⁶ *McCabe v. Gray*, 20 Cal. 509; *Abshire v. Corey*, 113 Ind. 484, 15 N. E. 685; *Faulknor v. Swart*, 55 Hun, 261, 8 N. Y. Supp. 239; *Adams v. Leavens*, 20 Conn. 73.

⁷⁷ *Goodwin v. Cunningham*, 12 Mass. 193; *St. Andrew v. Manufacturing Co.*, 134 Mass. 42; *Weeks v. Hunt*, 6 Vt. 15; *Crayton v. Clark*, 11 Ala. 787.

this though the assignee may have paid full value, and may have been wholly innocent.⁷⁸

It seems that the parties to a contract may stipulate that, if either assign his rights under it, the assignment shall be "free from equities;" that is to say, that the assignee shall not be liable to be met by such defenses as would have been valid against his assignor.⁷⁹

Same—Priority between Assignees.

It is held in England that "equitable titles have priority according to the priority of notice;"⁸⁰ that the successive assignees of an obligation rank as to their title according to the dates at which they gave notice to the party to be charged. This doctrine is also recognized by the courts of some of our states, and by the supreme court of the United States.⁸¹ The courts of many of the states, on the other hand, hold that equitable titles have priority, not according to the priority of notice, but according to priority in time of assignment, on the ground that as between assignor and assignee the assignment is complete without any notice to the debtor, and that a purchaser of a chose in action must always abide by the case of the person from whom he buys.⁸²

Under Statutes.

In most of the states, statutes have been enacted changing the common-law rules in relation to assignments of choses in action. These statutes vary somewhat, so that it would be impracticable to attempt to set them out. In most states it is substantially provided that the assignee of a chose may sue the debtor in his own name in the same manner as the assignor might have done before the assignment. In some states the same result is accomplished by statutes requiring ac-

⁷⁸ *Graham v. Johnson*, L. R. 8 Eq. 38; *Holbrook v. Burt*, 22 Pick. (Mass.) 546. But see *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453.

⁷⁹ *Ex parte Asiatic Banking Corp.*, 2 Ch. App. 397. "It is questionable, however, whether such a stipulation would protect the assignee against the effects of fraud, or any vital defect in the formation of the original contract." *Anson, Cont.* (8th Ed.) 238.

⁸⁰ *Stocks v. Dobson*, 4 De Gex, M. & G. 15.

⁸¹ *Ward v. Morrison*, 25 Vt. 593; *Murdoch v. Finney*, 21 Mo. 138; *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; *White's Heirs v. Prentiss' Heirs*, 3 T. B. Mon. (Ky.) 449; *Judson v. Corcoran*, 17 How. 612, 15 L. Ed. 331; *Spain v. Brent*, 1 Wall. 624, 17 L. Ed. 619; *Laclede Bank v. Schuler*, 120 U. S. 511, 7 Sup. Ct. 644, 30 L. Ed. 704; *In re Gillespie* (D. C.) 15 Fed. 734; *Methven v. Power Co.*, 66 Fed. 113, 13 C. C. A. 362; *Graham Paper Co. v. Pembroke*, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26.

⁸² *Muir v. Schenck*, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; *Thayer v. Daniels*, 113 Mass. 129; *Kamena v. Huelbig*, 23 N. J. Eq. 78; *Tingle v. Fisher*, 20 W. Va. 497; *Newby v. Hill*, 2 Metc. (Ky.) 530; *Ohio Life Ins. & Trust Co. v. Ross*, 2 Md. Ch. 25; *Macdonald v. Kneeland*, 5 Minn. 352 (Gil. 283); *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572.

tions to be brought in the name of the "real party in interest." It may be said generally that the effect of the statutes is to put an assignment of a chose in action on the same footing at law as in equity. What we have said, therefore, in treating of assignments in equity, generally applies to assignments at law under the statutes.⁸³

Negotiable Instruments.

It remains to mention a class of promises the benefit of which is transferable, under the law merchant, in such a way that the promise may be enforced by the transferee in his own name, without notice to the promisor, and under certain circumstances without risk of being met by many of the defenses which would have prevailed as against his transferror. These contracts are called "negotiable" instruments, for the reason that they may be transferred by "negotiation" as distinguished from "assignment." They include bills of exchange, promissory notes, checks, some classes of corporate bonds for the payment of money, and some other instruments. Most of these instruments are negotiable by the custom of merchants recognized by the courts. Some instruments are negotiable by statute. Promissory notes were put upon the same footing as bills of exchange by the statute of 3 & 4 Anne, c. 9, §§ 1-3, although this statute is to be regarded as only declaratory of the law.

Negotiation means transfer in the form and manner prescribed by the law merchant. If the instrument is payable to order, it is transferable by indorsement; if payable to bearer, by mere delivery.⁸⁴ The usual form of indorsement is the signature of the indorser, with or without a direction to pay to a specified indorsee or to his order. If the indorsee is specified, the indorsement is necessary to the further negotiation of the instrument; but if the indorsement specifies no indorsee, the instrument becomes in effect payable to bearer, and may be further negotiated by delivery.⁸⁵

The effect of negotiation is (1) to transfer the legal title to the transferee, so that he may sue upon the instrument in his own name;⁸⁶ and (2) if the transferee is a purchaser for value, before maturity of the instrument, and without notice of facts which would impeach its validity between antecedent parties, he may enforce payment, notwithstanding defenses (other than those which attach to the instrument itself and are good against all persons) which would have been good against his transferror or other prior parties.⁸⁷ Notice of the

⁸³ *Dakin v. Pomeroy*, 9 Gill. (Md.) 1; *Doering v. Kenamore*, 86 Mo. 588; *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200; *Jordan v. Thornton*, 7 Ark. 224, 44 Am. Dec. 546.

⁸⁴ Norton, Bills & N. (3d Ed.) 200-206.

⁸⁵ Norton, Bills & N. (3d Ed.) 105-118.

⁸⁶ Norton, Bills & N. (3d Ed.) 207-215.

⁸⁷ Norton, Bills & N. (3d Ed.) 216 et seq.

transfer need not be given to the party liable. Consideration is presumed to be given until the contrary appears, although the burden of proof may be changed if it appears that there was fraud or illegality in the issue or subsequent negotiation of the instrument.⁸⁸

Negotiable instruments may be transferred by assignment as well as by negotiation, but in such case only the equitable as distinguished from the legal title is transferred, and the incidents of the transfer are substantially the same as in the case of the transfer of a mere chose in action, the assignee standing in no better position than his assignor.⁸⁹ It would be beyond the scope of this book to go further into the law of negotiable instruments.

SAME—ASSIGNMENT BY OPERATION OF LAW.

198. Rules of law operate to transfer rights and liabilities arising out of a contract, under certain circumstances and to a certain extent, in the following cases:

- (a) Upon the transfer of an interest in land.
- (b) Upon a woman's marriage.
- (c) By death.
- (d) By bankruptcy.

We have thus far dealt with the manner in which the parties to a contract may by their own acts assign to others the benefits or liabilities of the contract. It remains now to show how these rights and liabilities may pass by operation of law.

SAME—ASSIGNMENT OF OBLIGATIONS ON TRANSFER OF INTERESTS IN LAND.

199. If a person, by purchase or lease, acquires an interest in land from another, on terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of his interest will operate as a transfer of these obligations to the assignee as follows:

- (a) Covenants affecting leasehold interests,
 - (1) If they touch and concern the thing demised, and relate to something which was in existence at the time of the lease, pass to the assignee, though not expressed to have been made with the lessee "and his assigns."

⁸⁸ Norton, Bills & N. (3d Ed.) 327.

⁸⁹ Edge v. Bumford, 31 L. J. Ch. 805; Central Trust Co. v. Bank, 101 U. S. 68, 25 L. Ed. 876; Osgood's Adm'rs v. Artt (C. C.) 17 Fed. 575; Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70; GOSHEN NAT. BANK v. BINGHAM, 118 N. Y. 349, 23 N. E. 180, 7 L. R. A. 595, 16 Am. St. Rep. 765; Norton, Bills & N. (3d Ed.) 196, 200.

- (2) If they relate to something not in existence at the time of the lease, they pass to the assignee, if expressed as made with the lessee "and assigns."
 - (3) In no case do merely personal or collateral covenants between the landlord and lessee pass to the latter's assignee.
 - (4) The reversioner or landlord does not at common law, by assigning his interest in the land, convey his rights and liabilities to the assignee, but this is very generally changed by statute.
- (b) **Covenants affecting freehold interests,**
- (1) If made to the owner of the land, and for his benefit, pass to his assignees, provided they touch and concern the land, and are not merely personal.
 - (2) If made by the owner, restricting his enjoyment of the land, they do not, at common law, bind his assignees, except in case of well-known interests, such as easements, recognized by law. In equity, however, it is otherwise in case of certain covenants of which the assignee had notice at the time of his purchase.⁹⁰

Covenants Affecting Leasehold Interests.

At common law, covenants affecting leasehold interests are said to "run with the land, and not with the reversion;" that is to say, they pass upon an assignment of the lease, but not upon an assignment or transfer of the reversion. If a lessee assigns his lease, the assignee, in certain cases, will be bound to the landlord by the same liabilities, and entitled to the same rights, as his assignor. The extent to which this is so may be stated thus:

(1) Covenants in a lease which "touch and concern the thing demised"⁹¹ pass to the lessee's assignee, and it is not necessary in such case that the covenants be expressed to have been made with the lessee "and his assigns." Of this class are covenants to repair, or to leave in good repair, or to deal with the land in any specified manner. Such covenants touch and concern the land, which is the thing demised.⁹²

⁹⁰ Following substantially Anson, *Cont.* (4th Ed.) 232.

⁹¹ As to the meaning of this term, see *Masury v. Southworth*, 9 Ohio St. 341; *Wiggins Ferry Co. v. Railroad Co.*, 94 Ill. 83; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Peden v. Railway Co.*, 73 Iowa, 328, 35 N. W. 424, 5 Am. St. Rep. 680; *Kettle R. R. Co. v. Railway Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *Nordleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Pittsburgh, Ft. W. & C. R. Co. v. Reno*, 123 Ill. 273, 14 N. E. 195; *Lyford v. Railroad Co.*, 92 Cal. 93, 28 Pac. 103.

⁹² *Spencer's Case*, 1 Smith, Lead. Cas. 168, and cases collected in note; *Norman v. Wells*, 17 Wend. (N. Y.) 136; *Suydam v. Jones*, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; *Leppla v. Mackey*, 31 Minn. 75, 16 N. W. 470; *Donelson v. Polk*, 64 Md. 501, 2 Atl. 824; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Callan v. McDaniel*, 72 Ala. 96; *Post v. Kearney*, 2 N. Y. 394, 51 Am. Dec. 303; *Fitch v. Johnson*, 104 Ill. 111; *Coburn v. Goodall*, 72 Cal. 498, 14 Pac. 190, 1 Am. St. Rep. 75.

(2) Covenants in a lease which touch and concern the thing demised, but relate to something not in existence at the time of the lease, pass to the lessee's assignee only where the covenant is expressly made with the lessee "and assigns."⁹³

(3) In no case does the assignee of a lease acquire benefit or incur liability from merely personal or collateral covenants made between the lessee and landlord. For instance, where a lessee of land covenanted to use the premises as a schoolhouse, and the lessor covenanted not to build or keep any house for the sale of intoxicating liquor within a certain distance of the premises, it was held that the benefit of the lessor's covenant did not pass to the assignee of the lease.⁹⁴

At common law, the assignment of his interest by the reversioner or landlord does not convey his rights and liabilities to his assignee. The law in this respect, however, was changed in England by a statute in the reign of Henry VIII.,⁹⁵ under which the assignee of the reversion is enabled to take the benefits and also incurs the liabilities of covenants entered into with his assignor. This statute is recognized as a part of the common law in some of our states, while in others similar statutes have been enacted.⁹⁶ The rules as to the connection of the covenants with the thing demised apply to such as run with the reversion equally with those that run with the land; that is to say, they must "touch and concern the thing demised," and not be merely personal or collateral.⁹⁷

⁹³ *Minshull v. Oakes*, 2 Hurl. & N. 808; *Spencer's Case*, 1 Smith, Lead. Cas. 168; *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282; *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604, 9 N. E. 845; *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910; *Coffin v. Talman*, 8 N. Y. 465; *Tallman v. Coffin*, 4 N. Y. 134; *Masury v. Southworth*, 9 Ohio St. 340; *Dorsey v. Railroad Co.*, 58 Ill. 65; *Cronin v. Watkins*, 1 Tenn. Ch. 119; *Bream v. Dickerson*, 2 Humph. (Tenn.) 126; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175.

⁹⁴ *Thomas v. Haywood*, L. R. 4 Exch. 311. The lessee cannot, by assigning the lease, release himself from his express covenants—as to pay rent. He cannot escape this liability without the landlord's consent, and the latter's mere assent to the assignment does not amount to a release. *Pfaff v. Golden*, 126 Mass. 402; *Oswald v. Fratenburgh*, 36 Minn. 270, 31 N. W. 173; *Greenleaf v. Allen*, 127 Mass. 248; *Nova Cesarea Harmony Lodge No. 2 v. White*, 30 Ohio St. 569, 27 Am. Rep. 492; *Harris v. Heackman*, 62 Iowa, 411, 17 N. W. 592; *Wilson v. Gerhardt*, 9 Colo. 585, 13 Pac. 705; *Ghegan v. Young*, 23 Pa. 18. If the landlord accepts the sublessee as tenant, and releases the lessee, it is otherwise. See *Colton v. Gorham*, 72 Iowa, 324, 33 N. W. 76.

⁹⁵ 32 Hen. VIII. c. 34.

⁹⁶ *Baldwin v. Walker*, 21 Conn. 168; *Howland v. Coffin*, 12 Pick. (Mass.) 125; *Perrin v. Lepper*, 34 Mich. 295. Where statute requires actions to be brought in name of real party in interest, it is held that action on covenants of lease may be brought by assignee of reversioner. See *Masury v. Southworth*, 9 Ohio St. 340; *Smith v. Harrison*, 42 Ohio St. 180.

⁹⁷ *Spencer's Case*, 1 Smith, Lead. Cas. 168.

Covenants Affecting Freehold Interests.

At common law, covenants entered into with the owner of land—that is to say, promises under seal made to the owner of land, and for his benefit—pass to his assignees, provided, as in other cases, they touch and concern the land conveyed, and are not merely personal.⁹⁸ For instance, if the vendor of land covenants with the purchaser that he has a good right to convey the land, the benefit of the covenant will pass to an assignee of the purchaser;⁹⁹ but it would be otherwise in case of a covenant relating to a matter purely personal between the covenantor and covenantee.¹⁰⁰

On the other hand, covenants entered into by the owner of land which restrict his enjoyment of the land do not, at common law, bind his assignee, except where he creates certain well-known interests, such as easements, recognized by the common law.¹⁰¹ If a man en-

⁹⁸ Horn v. Miller, 136 Pa. 640, 20 Atl. 706, 9 L. R. A. 810; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550; Peden v. Railway Co., 73 Iowa, 328, 35 N. W. 424, 5 Am. St. Rep. 680; Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190; St. Louis, I. M. & S. Ry. Co. v. O'Baugh, 49 Ark. 418, 5 S. W. 418; Raby v. Reeves, 112 N. C. 688, 16 S. E. 760; Hallenbeck v. Kindred, 109 N. Y. 620, 15 N. E. 887; Scott v. Stetler, 128 Ind. 385, 27 N. E. 721; De Gray v. Clubhouse Co., 50 N. J. Eq. 329, 24 Atl. 388; Lucas v. Turnpike Co., 36 W. Va. 427, 15 S. E. 182; Inhabitants of Middlefield v. Knitting Co., 160 Mass. 267, 35 N. E. 780. Covenant against paramount ground rent. Providence Life & Trust Co. v. Fiss, 147 Pa. 232, 23 Atl. 560.

⁹⁹ Suydam v. Jones, 10 Wend. (N. Y.) 180, 25 Am. Dec. 552; Beddoe's Ex'r v. Wadsworth, 21 Wend. (N. Y.) 120; Tillotson v. Prichard, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95; Flaniken v. Neal, 67 Tex. 629, 4 S. W. 212; Wead v. Larkin, 54 Ill. 489, 5 Am. Rep. 149; Thomas v. Bland, 91 Ky. 1, 14 S. W. 955, 11 L. R. A. 240; Succession of Cassidy, 40 La. Ann. 827, 5 South. 292; Allen v. Kennedy, 91 Mo. 324, 2 S. W. 142; Butler v. Barnes, 60 Conn. 170, 21 Atl. 419, 12 L. R. A. 273. But see Mygatt v. Coe, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646; Id., 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850.

¹⁰⁰ Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Masury v. Southworth, 9 Ohio St. 340; Glenn v. Canby, 24 Md. 127; Indianapolis Water Co. v. Nulte, 126 Ind. 373, 26 N. E. 72; Brewer v. Marshall, 18 N. J. Eq. 337; Id., 19 N. J. Eq. 537, 97 Am. Dec. 679; Costigan v. Railroad Co., 54 N. J. Law, 233, 23 Atl. 810; Lyford v. Railroad Co., 92 Cal. 93, 28 Pac. 103. It has been held that the right to reimbursement, or liability to reimburse, for the use of a party wall, under an agreement between adjoining landowners, is personal, and that it does not run with the land. Cole v. Hughes, supra; Todd v. Stokes, 10 Pa. 155; Gibson v. Holden, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146; Nalle v. Paggi (Tex. Sup.) 9 S. W. 205. But see Conduitt v. Ross, 102 Ind. 166, 26 N. E. 198; King v. Wight, 155 Mass. 444, 29 N. E. 644; Mott v. Oppenheimer, 135 N. Y. 312, 31 N. E. 1097, 17 L. R. A. 409. A covenant to support an old man in consideration of a conveyance by him is personal, and cannot be shifted to a purchaser of the land from the grantee. Divan v. Loomis, 68 Wis. 150, 31 N. W. 760.

¹⁰¹ Gibson v. Porter (Ky.) 15 S. W. 871; Hagerty v. Lee, 54 N. J. Law, 580, 25 Atl. 319, 20 L. R. A. 631; Id., 50 N. J. Eq. 464, 26 Atl. 537; Costigan v. Railroad Co., 54 N. J. Law, 233, 23 Atl. 810.

deavors to create restrictions on his land other than such interests, he cannot so affix them to the land as to bind subsequent owners. As said by Lord Brougham: "It must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. * * * Great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote."¹⁰²

Same—In Equity.

Courts of equity, however, have established a class of exceptions to the above rule. They have been mainly confined to covenants in the case of land sold for building purposes, though there seems no good reason for any limitation of the principle on which they are enforced. An illustration of this class of cases is where the vendor of land covenants that he will never use the adjoining land, retained by him, otherwise than in particular manner. Where he afterwards sells this adjoining land to one who has notice of the covenant, the latter is bound by the covenant. The principle has been thus stated: "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it that the latter shall either use or abstain from using the land purchased in a particular way is what I never knew disputed. * * * It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased."¹⁰³

¹⁰² Keppell v. Bailey, 2 Mylne & K. 517. And see Masury v. Southworth, 9 Ohio St. 340; Weld v. Nichols, 17 Pick. (Mass.) 538; Martin v. Drinan, 128 Mass. 515; Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254; West Virginia Transp. Co. v. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; Brewer v. Marshall, 18 N. J. Eq. 337; National Union Bank v. Segur, 39 N. J. Law, 184; Dorsey v. Railroad Co., 58 Ill. 65; Kennedy v. Owen, 136 Mass. 199; Maynard v. Polhemus (Cal.) 15 Pac. 451; Scott v. McMillan, 76 N. Y. 141; Blount v. Harvey, 51 N. C. 186; Hartung v. Witte, 59 Wis. 285, 18 N. W. 175.

¹⁰³ Tulk v. Moxhay, 2 Phil. 774. And see Trustees of Columbia College v. Thacher, 87 N. Y. 312, 41 Am. Rep. 365; Same v. Lynch, 70 N. Y. 440, 26 Am. Rep. 615; Haskell v. Wright, 23 N. J. Eq. 389; Stines v. Dorman, 25 Ohio St. 580; Thurston v. Minke, 32 Md. 487; DeGray v. Clubhouse Co., 50 N. J. Eq. 458, 24 Atl. 388; Clark v. Martin, 49 Pa. 289. Covenant by grantor of lots, "his heirs and assigns," not to build improvement on lots retained inferior to specified qualifications, binds his subsequent grantees with notice. Halle v. Newbold, 69 Md. 265, 14 Atl. 662. It has even been held that a covenant by a vendee of land not to sell sand therefrom, the intention being to prevent competition with the vendor, is enforceable against the covenantor's grantee buying with notice. Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1

SAME—ASSIGNMENT OF CONTRACTUAL OBLIGATION BY MARRIAGE.

200. At common law, upon a woman's marriage the right to reduce her choses in action into possession is transferred to her husband, and he becomes liable jointly with her, during coverture, upon her antenuptial contracts. These rules are changed by statute in most jurisdictions.

At common law, a married woman is disabled from acquiring the benefits of her antenuptial contract, because she cannot sue upon it apart from her husband, and she may lose them altogether, for they are vested conditionally in the husband, who may take them to himself by reduction into possession of the chose in action. He may also sue jointly with his wife for what is due on her contracts. Whatever is thus obtained passes absolutely to him. If the husband does not thus reduce his wife's choses in action into his possession, they survive to her if he dies first, or pass to her representatives if she dies in his lifetime.

At common law, the husband acquires the liabilities of the wife to the extent that he may be sued jointly with her on any contracts made by her before marriage.

Satutory Changes in the Law.

In England and in all of our states the common law in this respect has been very greatly changed by statute. In some states it has been virtually abolished and in these states the marriage of a woman does not in any way affect her rights or liabilities under contracts entered into before marriage.

SAME—ASSIGNMENT OF CONTRACTUAL OBLIGATION BY DEATH.

201. Death passes to the executors or administrators of the deceased all rights of action in respect of the personal estate, and, to the extent of his estate, all liabilities chargeable upon it. This does not include—

EXCEPTIONS—(a) Contracts depending on the personal services or skill of the deceased.

(b) Contracts the breach of which involves a purely personal loss.

On the death of a person all his personal estate passes, by operation of law, to his executors or administrators, and with it also pass all rights of action on contract which will affect such estate, and all lia-

Am. St. Rep. 816. Agreement for exclusive transportation of products of land by railroad to be extended or built over it will be so enforced. *Kettle River R. Co. v. Railway Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111.

bilities arising out of contract which are chargeable upon it;¹⁰⁴ and actions on such contracts are brought by or against the personal representative in his own name.¹⁰⁵ Covenants, for instance, which are attached to a leasehold estate, pass, as to benefit and liability, with the personalty to the executor or administrator; but covenants affecting freehold estates, such as covenants for title in a conveyance of freehold property, pass to the heir or devisee of the realty.

This rule does not include such contracts as depend upon the personal services or the skill of the deceased, which expire on the death of either of the parties.¹⁰⁶ An apprenticeship contract is thus terminated by the death of the master, and no claim to the services of the apprentice survives to the executor or administrator.¹⁰⁷ In like manner, breach of a contract which involves a purely personal loss does not confer a right of action upon executors or administrators. Thus, where an executor sued for a breach of promise to marry his testatrix, the promise having been broken, and the right of action having accrued in her lifetime, it was held that he could not recover, as it did not clearly appear that the breach of contract had resulted in damage to the personal estate.¹⁰⁸

Executors and administrators take no personal benefit from the contracts of the decedent, nor are they personally liable. They merely stand in his shoes, and represent him to the extent of his estate.

¹⁰⁴ Anson, Cont. (4th Ed.) 235; *Jewett v. Smith*, 12 Mass. 309; *Snodgrass v. Cabiness*, 15 Ala. 160; *Henderson v. Henshall*, 54 Fed. 320, 4 C. C. A. 357; *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Shirley v. Healds*, 34 N. H. 407. This subject is covered by statute in most of the states.

¹⁰⁵ *Potter v. Van Vranken*, 36 N. Y. 619.

¹⁰⁶ *BAXTER v. BURFIELD*, 2 Str. 1266; *DICKINSON v. CALAHAN'S ADMRS*, 19 Pa. 227; *YERRINGTON v. GREENE*, 7 R. I. 589, 84 Am. Dec. 578; *LACY v. GETMAN*, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806; *Marvel v. Phillips*, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370; *Blakely v. Susa*, Pa., 47 Atl. 286.

¹⁰⁷ *BAXTER v. BURFIELD*, 2 Strange, 1266.

¹⁰⁸ *CHAMBERLAIN v. WILLIAMSON*, 2 Maule & S. 408. And see *Finlay v. Chirney*, 20 Q. B. D. 494; *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; *Smith v. Sherman*, 4 Cush. (Mass.) 408; *Chase v. Fitz*, 132 Mass. 359; *Wade v. Kalbfleisch*, 58 N. Y. 282, 17 Am. Rep. 250; *Hovey v. Page*, 55 Me. 142; *Lattimore v. Simmons*, 13 Serg. & R. (Pa.) 183; *Grubbs v. Sult*, 32 Grat. (Va.) 203, 34 Am. Rep. 765.

JOINT AND SEVERAL CONTRACTS.

202. A contract in which there are two or more parties on either or both sides may be—

- (a) **Joint;**
- (b) **Several; or**
- (c) **Joint and several.**

Where several persons enter into a contract on the same side, either as promisors or promisees, they may do so jointly or severally, or, in the case of the persons bound, jointly and severally, making a joint promise and several distinct promises at the same time. Whether the contract is joint or several, or both joint and several, depends upon the intention of the parties, as manifested in the evidence of the contract. There are a number of rules for construing contracts, and determining this intention; but we must postpone their consideration until we come to treat of the interpretation of contracts.¹⁰⁹ We shall deal here only with the rules that govern the operation of the contract after such intention has been determined.

The rules which we shall state are the rules of the common law. It is never safe to assume that they are still in force in any particular jurisdiction, for they have been much modified by statute.

SAME—JOINT CONTRACTS.

203. Where several parties join in a promise,

- (a) **They are each liable for the whole debt or performance.**
- (b) **They are jointly, and not separately, liable, and must all be sued jointly.**
- (c) **Where one of them dies, the liability devolves upon the survivors, and, on the death of all, upon the personal representative of the last survivor.**
- (d) **A release of one, by act of the promisee, releases all.** *Not in Ca*

204. Where a promise is made to several jointly,

- (a) **They are entitled jointly, and not separately, and must join in a suit on the promise.**
- (b) **Where one of them dies, the legal right devolves upon the survivors, and on them alone.**

Several persons may join in a contract on one side or the other, or there may be several persons on both sides. In these cases the contract is said to be a joint contract or joint debt, and the persons composing the respective parties thereto are called "joint creditors" or "joint promisees," and "joint debtors," or "joint promisors."

¹⁰⁹ Post, p. 415.

Joint Promisors.

If several persons make a joint promise, each is liable to the promisee for the whole debt or liability, notwithstanding the fact that they are both liable. Neither is bound by himself, but each is bound to the full extent of the promise. If both are living and within the jurisdiction of the court, they should all be joined as defendants in an action on the contract.¹¹⁰ If one of them is sued alone, he is not bound to answer to the merits of the action without the others being sued with him. He may demur if the defect appears on the face of the pleading, or plead in abatement if it does not so appear.¹¹¹ If the defect so appears, it is fatal, not only on demurrer, but on motion in arrest of judgment.¹¹² If it does not so appear, the objection must be taken by plea in abatement; and, if the defendant pleads to the merits, he cannot object that others were jointly liable with him;¹¹³ for, when two are jointly bound in one bond or on one prom-

¹¹⁰ *Smith v. Miller*, 49 N. J. Law, 521, 13 Atl. 39; *Eller v. Lacy*, 137 Ind. 436, 36 N. E. 1088; *Van Leyen v. Wreford*, 81 Mich. 606, 45 N. W. 1116; *Ripley v. Crooker*, 47 Me. 370, 74 Am. Dec. 491; *WALKER v. BANK*, 5 C. C. A. 421, 56 Fed. 76; *Allin v. Shadburne's Ex'r*, 1 Dana (Ky.) 68, 25 Am. Dec. 121; *O'Brien v. Bound*, 2 Speer (S. C.) 495, 42 Am. Dec. 384; *McCall v. Price*, 1 McCord (S. C.) 82; *Meyer v. Estes*, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283. An understanding between the promisors themselves that one of them shall pay or perform the whole debt or promise does not affect the rule. *Lodge v. Dicus*, 3 Barn. & Ald. 611. A familiar illustration of joint promises is in the case of partnership debts. All the partners must be sued. In some states it is provided by statute that all contracts which by common law are joint only shall be construed to be joint and several. *Belleville Sav. Bank v. Winslow* (C. C.) 30 Fed. 488; *Wibaux v. Live Stock Co.*, 9 Mont. 154, 22 Pac. 492.

¹¹¹ *Rice v. Shute*, 5 Burrows, 2611; *STATE v. CHANDLER*, 79 Me. 172, 8 Atl. 553; *Nash v. Skinner*, 12 Vt. 219, 36 Am. Dec. 338; *Smith v. Miller*, 49 N. J. Law, 521, 13 Atl. 39; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380; *Bledsoe v. Irvin*, 35 Ind. 293; *Henderson v. Hammond*, 19 Ala. 340; *Potter v. McCoy*, 26 Pa. 458.

¹¹² *Gilman v. Rives*, 10 Pet. 298, 9 L. Ed. 432; *BRAGG v. WETZEL*, 5 Blackf. (Ind.) 95; *SWEIGART v. BERK*, 8 Serg. & R. 308; *McGregor v. Balch*, 17 Vt. 567; *Sinsheimer v. Skinner Mfg. Co.*, 165 Ill. 116, 46 N. E. 262.

¹¹³ *Rice v. Shute*, 5 Burrows, 2611; *Richards v. Heather*, 1 Barn. & Ald. 29; *Wilson v. McCormick*, 86 Va. 995, 11 S. E. 976; *Elder v. Thompson*, 13 Gray (Mass.) 91; *Maurer v. Midway*, 25 Neb. 575, 41 N. W. 395; *Mountstephen v. Brooke*, 1 Barn. & Ald. 224; *First Nat. Bank v. Hamor*, 7 U. S. App. 69, 1 C. C. A. 153, 49 Fed. 45; *Nash v. Skinner*, 12 Vt. 219, 36 Am. Dec. 338; *Hicks v. Cram*, 17 Vt. 449; *Lieberman v. Brothers*, 55 N. J. Law, 379, 26 Atl. 828; *Coon v. Anderson*, 101 Mich. 295, 59 N. W. 607. Where joint debtors are sued jointly, and a joint judgment recovered, the whole amount of the judgment may be levied against one. *Bird v. Randall*, 1 W. Bl. 388. Where judgment is thus obtained against less than all the joint debtors, it merges or extinguishes the right of action as against all. *KING v. HOARE*, 13 Mees. & W. 494; *KENDALL v. HAMILTON*, 4 App. Cas. 504; *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783; *Ward v. Johnson*, 13 Mass. 148. Other-

ise, though neither of them is bound by himself, yet neither of them can say that it is not his deed or promise.¹¹⁴

Same—Survivorship.

Upon the death of one of several joint promisors, the liability devolves upon the survivors. The personal representative of the deceased promisor cannot be sued jointly with the survivors. The whole liability, in this way, ultimately devolves upon the last surviving promisor, and, after his death, upon his representative.¹¹⁵ The estate of a deceased joint debtor may be charged in equity, unless he was merely a surety, and received no benefit from the contract.¹¹⁶

Same—Release.

At common law, a release of one joint-debtor by operation of law—as by a discharge in bankruptcy or insolvency—does not affect the liability of the others.¹¹⁷ It is otherwise, however, where the release is by an act of the creditor. In the latter case the other debtors are discharged.¹¹⁸ A mere covenant not to sue one joint debtor, it seems, does not operate as a discharge of the others.¹¹⁹

wise where the judgment is recovered against one of the joint debtors on a check given by him for the demand. PROSSER v. EVANS, 1 Q. B. (1895) 108.

¹¹⁴ WHELPDALE'S CASE, 5 Coke, 119; Rice v. Shute, 5 Burrows, 2613.

¹¹⁵ RICHARDS v. HEATHER, 1 Barn. & Ald. 29; Gere v. Clark, 6 Hill (N. Y.) 350; Brown v. Benight, 3 Blackf. (Ind.) 37, 23 Am. Dec. 373; Foster v. Hooper, 2 Mass. 572; Stevens v. Catlin, 152 Ill. 56, 37 N. E. 1023; Hoskinson v. Elliott, 62 Pa. 393; Atwell v. Milton, 4 Hen. & M. (Va.) 253; Clark v. Parish, 1 Bibb (Ky.) 547; Murphy v. Weil, 92 Wis. 467, 66 N. W. 532. As to the effect of the death of a joint debtor after judgment, see Leake, Cont. 215; Harbart's Case, 3 Coke, 14a. The doctrine of survivorship is virtually abolished by statute in most states. Taylor v. Taylor, 5 Humph. (Tenn.) 110; Williams v. Bradley, 5 Ohio Cir. Ct. R. 114; Fisher v. Hopkins, 4 Wyo. 379, 34 Pac. 899; Bachelder v. Fiske, 17 Mass. 464.

¹¹⁶ DAVIS v. VAN BUREN, 72 N. Y. 587; Richardson v. Draper, 87 N. Y. 337.

¹¹⁷ Leake, Cont. 214. Otherwise if creditor presents claim, under statute providing that creditor so doing shall be barred. Mungan v. French, 60 N. J. 112, 36 Atl. 771.

¹¹⁸ Brooks v. Stuart, 9 Adol. & E. 854; Maslin v. Hiett, 37 W. Va. 15, 16 S. E. 437; Rowley v. Stoddard, 7 Johns. (N. Y.) 207; HALE v. SPAULDING, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475; Goldbeck v. Bank, 147 Pa. 267, 23 Atl. 565; Lunt v. Stevens, 24 Me. 534; Allin v. Shadburne, 1 Dana (Ky.) 68, 25 Am. Dec. 121; Newcomb v. Raynor, 21 Wend. (N. Y.) 108, 34 Am. Dec. 219. This is changed by statute in some states. Otherwise if the instrument shows a contrary intention, as by a reservation of rights against other parties. North v. Wakefield, 13 Q. B. 536; Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283; Whittemore v. Judd Linseed & Sperm Oil Co., 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708; Parsons, Cont. 29.

¹¹⁹ Clayton v. Kynaston, 2 Salk. 573; Shed v. Pierce, 17 Mass. 628; Couch v. Mills, 21 Wend. (N. Y.) 424; Walker v. McCulloch, 4 Greenl. (Me.) 421; McLellan v. Bank, 24 Me. 566; Rowley v. Stoddard, 7 Johns. (N. Y.) 207.

Joint Promisees.

Where the contract is joint on the part of the promisees, all must join in suing upon it.¹²⁰ Even a disclaimer by one, if without the assent of the promisor, will not entitle the others to sue alone.¹²¹ If one of them is not joined as a plaintiff, the defendant may plead in abatement; but failure to do so will not constitute a waiver of the defect.¹²²

Same—Survivorship.

Where one of several joint promisees dies, the legal right under the contract devolves upon the survivors, and they only can sue on the contract. The representative of the deceased promisee cannot be joined, nor can he sue alone.¹²³

Same—Release.

A payment of the debt to one of several joint promisees is a discharge of the debt. So, also, one of the promisees, without the others joining, may give a valid release of the debt, and it will bind the others.¹²⁴

¹²⁰ *Eccleston v. Clipsham*, 1 Wms. Saund. 153; *Hatsall v. Griffith*, 2 Crompt. & M. 679; *Pease v. Hirst*, 10 Barn. & C. 122; *Dob v. Halsey*, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293; *Gould v. Gould*, 6 Wend. (N. Y.) 263; *Hewes v. Bayley*, 20 Pick. (Mass.) 96; *Archer v. Bogue*, 3 Scam. (Ill.) 526; *Wilson v. Wallace*, 8 Serg. & R. (Pa.) 53; *Slaughter v. Davenport*, 151 Mo. 26, 51 S. W. 471. See, also, *Clark v. Great Northern R. Co.* (C. C.) 81 Fed. 282.

¹²¹ *Wetherell v. Langston*, 1 Exch. 634; *Angus v. Robinson*, 59 Vt. 585. 8 Atl. 497, 59 Am. Rep. 758; *Whart. Cont.* 814.

¹²² If one of the joint promisees is omitted, and the defect appears upon the record, it may be objected to by demurrer, or by motion in arrest of judgment, or by error. *Petrie v. Bury*, 3 Barn. & C. 353; *Pugh v. Stringfield*, 3 C. B. (N. S.) 2; *Wetherell v. Langston*, 1 Exch. 634; *Ehle v. Purdy*, 6 Wend. (N. Y.) 629; *Baker v. Jewell*, 6 Mass. 460, 4 Am. Dec. 162; *Beach v. Hotchkiss*, 2 Conn. 697; *Wiggin v. Cumings*, 8 Allen (Mass.) 353. If the defect does not appear upon the record, there would be a variance between the contract as pleaded and proved, which, unless amended, would be fatal. *Jell v. Douglas*, 2 B. & Ald. 374; *Chanter v. Leese*, 4 Mees. & W. 295; *Hallett v. Gordon*, 122 Mich. 567, 81 N. W. 556.

¹²³ *MARTIN v. CRUMP*, 2 Salk. 444; *ANDERSON v. MARTINDALE*, 1 East, 497; *Peters v. Davis*, 7 Mass. 257; *Murray v. Mumford*, 6 Cow. (N. Y.) 441; *Supreme Lodge v. Portingall*, 167 Ill. 291, 47 N. E. 203, 59 Am. St. Rep. 296; *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164.

¹²⁴ *RAWSTORNE v. GANDELL*, 15 Mees. & W. 304; *Wilkinson v. Lindo*, 7 Mees. & W. 81; *Myrick v. Dame*, 9 Cush. (Mass.) 248; *Tuckerman v. Newhall*, 17 Mass. 581; *Bruen v. Marquard*, 17 Johns. (N. Y.) 58; *Pierson v. Hooker*, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; *Napier v. McLeod*, 9 Wend. (N. Y.) 120; *OSBORN v. MARTHA'S VINEYARD R.*, 140 Mass. 549, 5 N. E. 486; *Moore v. Bovier*, 60 Minn. 240, 62 N. W. 281. Where a partner in a firm doing business in the state, to which a citizen of the state was indebted, was a non-resident, a discharge of the debtor in insolvency by a court of the state, since it did not affect the rights of the nonresident, did not discharge the debt. *Chase v. Henry*, 166 Mass. 577, 44 N. E. 988, 55 Am. St. Rep. 423.

SAME—SEVERAL CONTRACTS.

205. If two or more parties bind themselves severally to another in respect of the same matter or debt, their liability is separate and distinct, and they cannot be sued jointly.

206. If one party binds himself to several parties severally, their right to enforce the promise is separate.

On the other hand, several persons may bind themselves severally to another in respect of the same matter or debt, so that the creditor is entitled to claim the whole debt or performance against each debtor separately.¹²⁵ In such case the promisors must be sued separately; they cannot be sued jointly.¹²⁶ Where the promisors are severally liable, and therefore, of course, where they are both jointly and severally liable, a judgment against less than all of them does not discharge the others until it has been satisfied.¹²⁷ Again, one person may bind himself to each of several persons, provided the interest of each in the subject-matter of the promise is several, so that each promisee is separately entitled to sue thereon.¹²⁸

Survivorship.

The doctrine of survivorship applicable to joint contracts does not apply to several contracts.¹²⁹

¹²⁵ *Lurton v. Gilliam*, 1 Scam. (Ill.) 577, 33 Am. Dec. 430.

¹²⁶ *Davis v. Belford*, 70 Mich. 120, 37 N. W. 919; *Price v. Railroad Co.*, 18 Ind. 137; *Sims v. Clark*, 91 Ga. 302, 18 S. E. 158; *Streator v. Paxton*, 201 Pa. 135, 50 Atl. 926. This is changed by statute in most states. See *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302; *Wibaux v. Live-Stock Co.*, 9 Mont. 154, 22 Pac. 492; *Brown v. McKee*, 108 N. C. 387, 13 S. E. 8; *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *Costigan v. Lunt*, 104 Mass. 217.

¹²⁷ *Ward v. Johnson*, 13 Mass. 148; *Harlan v. Berry*, 4 G. Greene (Iowa) 212.

¹²⁸ *KEIGHTLEY v. WATSON*, 3 Ex. 716; *Rorabacher v. Lee*, 16 Mich. 169; *Hall v. Leigh*, 8 Cranch, 50, 3 L. Ed. 484; *Chanter v. Leese*, 4 Mees. & W. 295; *Geer v. School Dist.*, 6 Vt. 76; *Catawissa R. Co. v. Titus*, 49 Pa. 277; *Yates v. Foot*, 12 Johns. (N. Y.) 1; *Burton v. Henry*, 90 Ala. 281, 7 South. 925; *Emmeluth v. Home Benefit Ass'n*, 122 N. Y. 130, 25 N. E. 234, 9 L. R. A. 704; *Shipman v. Straitsville Cent. Min. Co.*, 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1015.

¹²⁹ *Enys v. Donnithorne*, 2 Burrows, 1190; *Carthrae v. Brown*, 3 Leigh (Va.) 98, 23 Am. Dec. 255.

SAME-CONTRACTS BOTH JOINT AND SEVERAL.

- 207. Where a contract in respect of the promisors is both joint and several,**
- (a) **The promisee may sue all the promisors jointly, or each one separately.**
 - (b) **If he sues jointly, he must sue all the promisors; he cannot sue less than all jointly.**

Again, several persons may concurrently contract respecting the same matter, binding themselves jointly and also severally.¹³⁰

Where the promise is both joint and several, the promisee may, at his election, either sue all the promisors jointly, or each one of them separately.¹³¹ But he must do one or the other. He cannot sue less than all of them jointly. If, for example, there are three promisors, he cannot join two.¹³²

A promise cannot be so made in respect of one and the same matter as to entitle several persons under it both jointly and severally. They must either be entitled under it jointly only, or severally only.¹³³

Survivorship.

As we have seen, the doctrine of survivorship does not apply to several contracts. It necessarily follows that it does not apply to joint and several contracts.

SAME-CONTRIBUTION BETWEEN JOINT DEBTORS.

- 208. Where one of several joint debtors pays the whole debt, he may, in the absence of an agreement to the contrary, enforce contribution from the others; that is, he may recover from them their proportionate share of the debt.**

The rights and liabilities of persons who have contracted jointly or severally respecting the same matter as between themselves depend

¹³⁰ Leake, Cont. 217; BEECHAM v. SMITH, El., Bl. & El. 442; Hemmenway v. Stone, 7 Mass. 54, 5 Am. Dec. 27; Klapp v. Kleckner, 3 Watts & S. (Pa.) 519.

¹³¹ Schilling v. Black, 49 Kan. 552, 31 Pac. 143; Carter v. Carter, 2 Day (Conn.) 412, 2 Am. Dec. 113. A judgment against all is not a bar to an action against each. PEOPLE v. HARRISON, 82 Ill. 84; Davis v. Sanderlin, 119 N. C. 84, 25 S. E. 815. Contra, United States v. Price, 9 How. 83, 13 L. Ed. 56.

¹³² STATE v. CHANDLER, 79 Me. 172, 8 Atl. 553.

¹³³ SLINGSBY'S CASE, 5 Coke, 18b; ANDERSON v. MARTINDALE, 1 East, 497; Bradburne v. Botfield, 14 Mees. & W. 573; Eveleth v. Sawyer, 96 Me. 227, 52 Atl. 639.

upon the relation in which they stand, and the agreement or understanding upon which they have joined in the contract. In general, the contract itself is independent of such relation or agreement. In contracts of guaranty or suretyship, for instance, made between the creditor and the principal debtor and his sureties, the principal debtor and the sureties are usually all made debtors in equal degree to the creditor, who may recover the whole debt against all or any of them. As between themselves, however, the principal debtor is solely liable; and, if the surety is called upon by the creditor to pay any part of the debt, he may, upon payment, recover the amount from the principal debtor.¹³⁴ So, where there are several sureties, who are all primarily liable for the whole debt to the creditor, and one of them is called upon to pay, each of the cosureties becomes ratably indebted to him for contribution.¹³⁵ This rule is not limited to contribution between sureties, but applies to joint contractors generally. Where one of them is compelled to pay the whole debt, the law creates a promise on the part of the others to pay him their proportion, and he may sue them thereon.¹³⁶ The liability is quasi contractual. This doctrine of contribution applies where the contract is joint, or both joint and several, but not where it is several only. Formerly the right to contribution could only be enforced in equity, but now, except as between sureties, it may be enforced at law, as well as in equity. In some jurisdictions contribution between sureties can still be enforced in equity only, except where a statute provides otherwise.¹³⁷

* The principal contract may in some cases be affected by the rights and relations of the several parties who join in it. For instance, in contracts of guaranty or suretyship, the creditor is bound, upon principles of equity, to abstain from any dealing with the debtor which may prejudice the surety. If he binds himself to give further time to the debtor, without the consent of the surety, the latter is discharged.¹³⁸

¹³⁴ Post, p. 534, note 21.

¹³⁵ Post, p. 533. The quasi contract for contribution is several and not joint. A surety therefor may enforce contribution against the estate of a deceased cosurety. *Bachelor v. Fiske*, 17 Mass. 464; *Handley v. Heflin*, 84 Ala. 600, 4 South. 725.

¹³⁶ *Doremus v. Selden*, 19 Johns. (N. Y.) 213; *Sears v. Starbird*, 78 Cal. 225, 20 Pac. 547; *Fletcher v. Grover*, 11 N. H. 368, 35 Am. Dec. 497; *Jeffries v. Ferguson*, 87 Mo. 244; *Foster v. Burton*, 62 Vt. 239, 20 Atl. 326; *Logan v. Trayser*, 77 Wis. 579, 46 N. W. 877.

¹³⁷ *Longley v. Griggs*, 10 Pick. (Mass.) 121; *McDonald v. Magruder*, 3 Pet. 470, 7 L. Ed. 744.

¹³⁸ *Rees v. Berrington*, 2 Ves. Jr. 540; *Pooley v. Harradine*, 7 El. & Bl. 431; *Gordon v. Bank*, 144 U. S. 97, 12 Sup. Ct. 657, 36 L. Ed. 360. *Chemical Co. v. Pegram*, 112 N. C. 614, 17 S. E. 298; *Durbin v. Kuney*, 19 Or. 71, 23 Pac. 661.

CHAPTER X.

INTERPRETATION OF CONTRACT.

- 209-213. Rules Relating to Evidence—In General—Parol Evidence.
- 214-215. Proof of Document.
- 216. Evidence as to Fact of Agreement.
- 217. Evidence as to Terms of Contract.
- 218-219. Rules of Construction—General Rules.
- 220. Rules as to Time.
- 221-222. Rules as to Penalties and Liquidated Damages.
- 223. Joint and Several Contracts.

We have next to consider the mode in which the courts deal with a contract when it comes before them in litigation, or the interpretation of contracts. In considering this question we have to learn how the existence and the terms of a contract are proved; how far, when proved to exist in writing, they can be modified by evidence extrinsic to that which is written; and what rules have been adopted for construing the meaning of the terms when fully before the court. The subject, therefore, divides itself into (1) rules relating to evidence, and (2) rules relating to construction. Under the first head we have to consider the sources to which we may go for the purpose of ascertaining the expression by the parties of their common intention. Under the second we have to consider the rules which exist for construing that intention from expressions ascertained to have been used.¹

RULES RELATING TO EVIDENCE—IN GENERAL—PAROL EVIDENCE.²

- 209. The circumstances under which an alleged contract by word of mouth was made, what was said and done by the parties, and their intention to contract, are questions of fact for the jury. Whether what was said and done amounts to a contract, and its effect, are questions of law for the court.
- 210. Where a man is proved to have made a contract by word of mouth upon certain terms, he cannot say he did not mean what he said.
- 211. A contract, or portion thereof, reduced to writing, cannot be altered by parol evidence.
- 212. If a contract is under seal, the instrument itself is the contract, and its proof proves the contract.

¹ Anson, Cont. (4th Ed.) 237.

² Following substantially Anson, Cont. (4th Ed.) 238-240.

213. A writing not under seal, whether required by the statute of frauds or not, is not itself the contract, but only evidence of the contract, so that a simple contract may have to be proved by writing, or by proof of words or acts, or partly by one and partly by the other.

If a dispute arises as to the terms of a contract made by word of mouth or by acts, or partly by both, it is necessary, in the first instance, to ascertain what was said or done, and the circumstances under which the supposed contract was formed. These are questions of fact to be determined by the jury from the evidence adduced before them. When a jury has found, as a matter of fact, what the parties said and did, and that they intended to enter into a contract, it is for the court to say whether what they have said or done amounts to a contract, and what is its effect.

When a person is proved to have made a contract by word of mouth upon certain terms, he cannot be heard to say that he did not mean what he said. The law imputes to a person a state of mind or intention corresponding to the rational and honest meaning of his words; and not only of his words, but of his actions as well; and where the conduct of a person towards another, judged by a reasonable standard, manifests an intention to agree in regard to some matter, that agreement is established in law as a fact by proof of that conduct, whatever may be the real but unexpressed state of his mind on the matter.

The principle above stated applies also to contracts made in writing. Where parties have put into writing any portion of the terms of their agreement, they cannot alter by parol evidence that which is written; and, where the writing purports to be the whole of the agreement, it can neither be added to nor varied by parol evidence of their unexpressed intention.

It is not necessary for us to discuss the rules of evidence as regards purely oral contracts, for proof of a contract made by word of mouth is a part of the general law of evidence. Our consideration of the rules of evidence will therefore be confined to their effect upon written contracts and contracts under seal.

Admissible evidence extrinsic to such contracts falls under three heads: (1) Evidence as to the fact that there is a document purporting to be a contract, or part of a contract. (2) Evidence that the professed contract is in fact what it professes to be. It may lack some element necessary to the formation of contract, or be subject to some parol condition upon which its existence as a contract depends. (3) Evidence as to the terms of the contract. These may require illustration which necessitates some extrinsic evidence; or they may be ambiguous, and then may be in like manner explained; or they may comprise, unexpressed, a custom or usage the nature and effect of which have to be proved.

Difference between Formal and Simple Contracts.

Before taking up these questions as to the admissibility of evidence it will be well to note the difference between contracts under seal and simple contracts in writing, as illustrated by the rules of evidence respecting them. A contract under seal, as we have seen, derives its validity from the form in which it finds expression; therefore, if the instrument is proved, the contract is proved, unless it can be shown to have been executed under such circumstances as preclude the formation of contract, or to have been delivered to a third person under conditions which have remained unfulfilled, so that the deed is no more than an escrow. A written contract not under seal, however, is not the contract itself, but only evidence of the contract,—a record of the contract.³ Even where statutory requirements for writing exist, as under the statute of frauds, the writing is nothing more than evidence of the agreement. A written offer containing all the terms of the contract, signed by the proposer, and accepted by the other party by performance on his part, is enough to enable the latter to sue under the statute of frauds. And where there is no such necessity for writing, it is optional with the parties to express their agreement by word of mouth, by action, or by writing, or partly by one and partly by another of these processes. It is always possible, therefore, that a simple contract may have to be sought for in the words and acts, as well as in the writing, of the contracting parties. But in so far as they have reduced their meaning to writing they cannot adduce evidence in contradiction or alteration of it. They put on paper what is to bind them, and so make the written document conclusive evidence against them.⁴

SAME—PROOF OF DOCUMENT.

214. A contract under seal is proven by evidence of the sealing and delivery.

215. In proving a simple contract evidenced by a document, parol evidence is admissible for the following purposes:

- (a) To show that the defendant is the person who made the contract.
- (b) To supplement the writing where it only constitutes a part of the contract.
- (c) To connect several documents which together show the contract, except—

EXCEPTION—Where the contract is within the statute of frauds.

Contracts under Seal.

A contract under seal is proved by evidence of the sealing and delivery. At common law it is necessary to call one of the attesting

³ Wake v. Harrop, 6 Hurl. & N. 768.

⁴ Id.

witnesses where a contract under seal is attested;⁵ but by statute in many jurisdictions this is no longer necessary. Where the attesting witnesses are dead, or without the jurisdiction of the court, or are for any other reason incapable of testifying, the sealing and delivery of the deed is sufficiently shown by proof of their handwriting.⁶ In a number of states it has been considered that proof of the handwriting of the grantor or obligor furnishes more satisfactory evidence of its execution than proof of the handwriting of the subscribing witness, and such proof has been held sufficient, except in the case of instruments which the law requires to be attested by witnesses.⁷

Simple Contracts.

In proving a simple contract, whether in writing or not, parol evidence is always necessary to show that the party sued is the party who made the contract and is bound by it. In no other way could this be shown.

Oral evidence must of course supplement the writing where the writing only constitutes a part of the contract. For instance, if a person writes another that he will give the latter a certain sum for an article, and tells him to ship it if he accepts the offer, parol evidence of the shipment would be necessary to prove conclusion of the contract. And so, if a person puts the terms of an agreement into a written offer which the other party accepts by word of mouth, or if, where no writing is necessary, he puts part of the terms into writing, and arranges the rest by parol with the other party, oral evidence must be given in both cases to show that the contract was concluded upon those terms by the acceptance of the other party.⁸

So, also, where the evidence of a contract consists of several documents which do not on their face show their connection with each other, parol evidence is admissible to show their connection,⁹ except

⁵ *Burke v. Miller*, 7 Cush. (Mass.) 547; *Henry v. Bishop*, 2 Wend. (N. Y.) 575; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Hess v. Griggs*, 43 Mich. 397, 5 N. W. 427; *McAdams' Ex'rs v. Stilwell*, 13 Pa. 90; *Brigham v. Palmer*, 3 Allen (Mass.) 450; *Melcher v. Flanders*, 40 N. H. 139; *Jackson v. Sheldon*, 22 Me. 569; *Dorr v. School Dist.*, 40 Ark. 237.

⁶ *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; *Beattie v. Hilliard*, 55 N. H. 428; *Davis v. Higgins*, 91 N. C. 382; *Richards v. Skiff*, 8 Ohio St. 586; *Elliott v. Dycke*, 78 Ala. 150; *Troeder v. Hyams*, 153 Mass. 536, 27 N. E. 775; *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. Ct. 313, 27 L. Ed. 641.

⁷ *Newsom v. Luster*, 13 Ill. 175; *Cox v. Davis*, 17 Ala. 714, 52 Am. Dec. 159; *Woodman v. Segar*, 25 Me. 90; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; *Landers v. Bolton*, 26 Cal. 393.

⁸ *Harris v. Rickett*, 4 Hurl. & N. 1.

⁹ *Edwards v. Insurance Soc.*, 1 Q. B. Div. 563; *Bergin v. Williams*, 138 Mass. 544; *Barney v. Forbes*, 118 N. Y. 580, 23 N. E. 890; *Blake v. Coleman*, 22 Wis. 415, 99 Am. Dec. 53; *Beer v. Aultman-Taylor Co.*, 32 Minn. 90, 19 N. W. 388; *Myers v. Munson*, 65 Iowa, 423, 21 N. W. 759; *COLBY v. DEARBORN*, 59 N. H. 326.

in the case of contracts which the statute of frauds requires to be expressed in writing.¹⁰

There are circumstances, such as the loss or inaccessibility of the written contract, in which parol evidence of the contents of a document is allowed to be given, but this is a part of the general law of evidence.

SAME—EVIDENCE AS TO FACT OF AGREEMENT.¹¹

216. A document having been proved, parol evidence is admissible to show that it is not in fact a valid agreement.

Thus far we have dealt with the mode of bringing a document purporting to be an agreement, or part of an agreement, before the court. Parol evidence is always admissible to show that the document is not in fact a valid agreement. It may be shown, for instance, that incapacity of one of the parties, want of genuine consent because of mistake, fraud, etc.,¹² or illegality of object,¹³ made the agreement of the parties unreal, or such as the law forbids to be carried out. In case of a simple contract, it may be shown, where the promise only appears in writing, that no consideration was given for the promise.¹⁴

¹⁰ Ante, p. 87.

¹¹ Following substantially Anson, *Cont.* (4th Ed.) 241-243.

¹² *Grand Tower & C. G. R. Co. v. Walton*, 150 Ill. 428, 37 N. E. 920; *Ewing v. Wilson*, 132 Ind. 223, 31 N. E. 65, 19 L. R. A. 767; *Cooper v. Finke*, 38 Minn. 2, 35 N. W. 469; *Anderson v. Walter*, 34 Mich. 113; *Wanner v. Landis*, 137 Pa. 61, 20 Atl. 950; *Universal Fashion Co. v. Skinner*, 64 Hun, 293, 19 N. Y. Supp. 62; *Kranich v. Sherwood*, 92 Mich. 397, 52 N. W. 741; *Scroggin v. Wood*, 87 Iowa, 497, 54 N. W. 437; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241; *Marston v. Insurance Co.*, 89 Me. 266, 36 Atl. 389, 56 Am. St. Rep. 412; ante, p. 195.

¹³ *Allen v. Hawks*, 13 Pick. (Mass.) 79; *Friend v. Miller*, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; *Buffendeau v. Brooks*, 28 Cal. 642; *Beadles v. McElrath*, 85 Ky. 230, 3 S. W. 152; *Totten v. U. S.*, 92 U. S. 105, 23 L. Ed. 605; *New England Mortg. Security Co. v. Gay (C. C.)* 33 Fed. 636; *Lewis v. Willoughby*, 43 Minn. 307, 45 N. W. 439; *Benicia Agricultural Works v. Estes (Cal.)* 32 Pac. 938; ante, p. 254.

¹⁴ As to the conclusiveness of the recital of consideration in a written contract or conveyance, there has been a great deal of conflict. The New York court held in a leading case that the consideration clause in a conveyance is only *prima facie* evidence of a consideration, except for the purpose of giving effect to the operative words of the conveyance, and that to that end alone is it conclusive. The rule, it seems, applies to all written contracts, and is the prevailing doctrine in this country. *McCrea v. Parmort*, 16 Wend. 460, 30 Am. Dec. 103. See *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Rhine v. Ellen*, 36 Cal. 362; *Miller v. Edgerton*, 38 Kan. 36, 15 Pac. 894; *Nichols, Shepard & Co. v. Burch*, 128 Ind. 324, 27 N. E. 737; *Barbee v. Barbee*, 108 N. C. 581, 13 S. E. 215; *Id.*, 109 N. C. 299, 13 S. E. 792; *Mobile Sav. Bank v. McDonnell*,

In case of a deed, want of consideration cannot ordinarily be shown, because its validity does not depend on consideration, but on its form; but, where fraud or undue influence is alleged against the validity of the deed, the absence or inadequacy of consideration may be shown in corroboration of other evidence tending to sustain the allegation.

Apart from such circumstances as these, it is permissible to prove a parol condition suspending the operation of the contract; and this applies both to deeds and simple contracts. A deed, for instance, may be shown to have been signed, or to have been delivered to a third person subject to the happening of an event or the doing of an act. In the latter case, until the event happens, or the act is done, the deed remains an escrow, and the terms upon which it was delivered may be proved by extrinsic evidence; but, as we have seen, this cannot be where the deed is delivered to the other party himself.¹⁵

So, also, with simple contracts in writing. Evidence may be given to the effect that a document purporting to be a contract is not so in fact. It may be dependent upon a condition not expressed in the document, so that, until the condition happens, the parties agree that the written contract is to remain inoperative. In a case involving this point, the law was stated as follows: "The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and if, in fact, he did sign the paper animo contrahendi, the terms contained in it are conclusive, and cannot be varied by parol evidence. But in the present case the defense begins one step earlier. The parties met and expressly stated to each other that though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defense may be set up without ground, * * * but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing

89 Ala. 434, 8 South. 137, 9 L. R. A. 645, 18 Am. St. Rep. 137; Macomb v. Wilkinson, 83 Mich. 486, 47 N. W. 336; Halpin v. Stone, 78 Wis. 183, 47 N. W. 177; Louisville, St. L. & T. R. Co. v. Neafus, 93 Ky. 53, 18 S. W. 1039; Hall v. Solomon, 61 Conn. 476, 23 Atl. 876, 29 Am. St. Rep. 218; Silvers v. Potters, 48 N. J. Eq. 539, 22 Atl. 584; Hill v. Whidden, 158 Mass. 261, 33 N. E. 526; Bristol Sav. Bank v. Stiger, 86 Iowa, 344, 53 N. W. 265.

¹⁵ Ante, p. 55; Richards v. Day, 63 Hun. 635, 18 N. Y. Supp. 733; Haworth v. Norris, 28 Fla. 763, 10 South. 18; Gregory v. Littlejohn, 25 Neb. 368, 41 N. W. 253; note 18, *infra*. Proof that parties who signed a bond did so on condition that other persons named therein as sureties would also sign it is competent to show that it was never completely executed. State v. Wallis, 57 Ark. 64, 20 S. W. 811.

is not admissible, but evidence to show that there is not an agreement at all is admissible.”¹⁶

SAME—EVIDENCE AS TO TERMS OF CONTRACT.¹⁷

217. Parol evidence as to the terms of a contract which appears to be complete in writing is inadmissible, except

- (a) **To prove terms which are supplementary or collateral to so much of the agreement as is in writing.**
- (b) **To explain terms of the contract which need explanation.**
- (c) **To introduce a custom or usage into the contract.**
- (d) **In the application by courts of equity of their peculiar remedies in cases of mistake.**

The admissibility of extrinsic evidence affecting the terms of a contract is narrowed to a small compass, for, as we have already said, it is the general rule that the written record of a contract must not be varied or added to by verbal evidence of what was the intention of the parties.¹⁸

¹⁶ *Pym v. Campbell*, 6 El. & Bl. 370. And see *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111; *Wilson v. Powers*, 131 Mass. 539; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563; *Juilliard v. Chaffee*, 92 N. Y. 529; *REYNOLDS v. ROBINSON*, 110 N. Y. 654, 18 N. E. 127; *Westman v. Krumweide*, 30 Minn. 313, 15 N. W. 255; *Lipscomb v. Lipscomb*, 32 S. C. 243, 10 S. E. 929; *Solenberger v. Gilbert's Adm'r*, 86 Va. 778, 11 S. E. 789; *Humphreys v. Railroad Co.*, 88 Va. 431, 13 S. E. 985; *Gibbons v. Ellis*, 83 Wis. 434, 53 N. W. 701; *BLEWITT v. BOORUM*, 142 N. Y. 357, 37 N. E. 119, 40 Am. St. Rep. 600; *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235. This rule, in the absence of fraud, does not permit parol evidence of an agreement contemporaneous with a written contract, such as a note or bond, which has been completely executed and finally delivered, so as to take effect, that the obligee or promisee would not enforce the contract, or that the liability of the obligor or promisor should be dependent upon a condition not expressed in the writing. See note 17, *infra*.

¹⁷ *Anson, Cont.* (4th Ed.) 243-251.

¹⁸ *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; *Pierce v. Tidwell*, 81 Ala. 299, 2 South. 15; *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103; *Bofinger v. Tuyes*, 120 U. S. 198, 7 Sup. Ct. 529, 30 L. Ed. 649; *De Long v. Lee*, 73 Iowa, 53, 34 N. W. 613; *Gilbert v. Plow Co.*, 119 U. S. 491, 7 Sup. Ct. 305, 30 L. Ed. 476; *Williams v. Kent*, 67 Md. 350, 10 Atl. 228; *Conant v. Bank*, 121 Ind. 323, 22 N. E. 250; *Merchants' & Farmers' Nat. Bank v. McElwee*, 104 N. C. 305, 10 S. E. 295; *Harrow Spring Co. v. Harrow Co.*, 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421; *Gaspar v. Heimbach*, 53 Minn. 414, 55 N. W. 559; *Viollette v. Rice*, 173 Mass. 82, 53 N. E. 144; *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099; *Smith v. Bank*, 89 Fed. 832, 32 C. C. A. 368. The legal effect of a written contract is as much within the protection of the rule as its language. *Barry v. Ransom*, 12 N. Y. 461. In the absence of fraud, parol evidence is not

Proof of Supplementary or Collateral Terms.

If the parties to a contract have not put all its terms in writing, parol evidence of the supplementary terms is admissible, not to vary, but to complete, the written contract.¹⁹ Thus, where a written contract for the sale of goods mentions the price, but is silent as to the terms of payment, the terms may be shown by parol evidence.²⁰ And a subsequent agreement changing the terms of a written contract may be shown by parol evidence.²¹

admissible to show that the obligee, contemporaneously with the execution of a bond, promised not to enforce it as against one of the parties. *Towner v. Lucas' Ex'r*, 13 Grat. (Va.) 705; *Barnett v. Barnett*, 83 Va. 504, 2 S. E. 733; *Yeager v. Yeager* (Pa. Sup.) 8 Atl. 579. Nor, where a written contract has been fully executed and delivered, is parol evidence admissible of an understanding that it should not be operative according to its terms, or that the liability of the promisor, absolute on the face of the instrument, was intended to be conditional. *McCormick Harvesting Mach. Co. v. Wilson*, 39 Minn. 467, 40 N. W. 571; *Marquis v. Lauretson*, 76 Iowa, 23, 40 N. W. 73; *Meekins v. Newberry*, 101 N. C. 17, 7 S. E. 655; *Thompson v. McKee*, 5 Dak. 172, 37 N. W. 367; *Coapstick v. Bosworth*, 121 Ind. 6, 22 N. E. 772; *Dexter v. Ohlander*, 93 Ala. 441, 9 South. 361; *Engelhorn v. Reitlinger*, 122 N. Y. 76, 25 N. E. 297, 9 L. R. A. 548; *Ziegler v. McFarland*, 147 Pa. 607, 23 Atl. 1045; *Osborne v. Taylor*, 58 Conn. 439, 20 Atl. 605; *Harrison v. Morrison*, 39 Minn. 319, 40 N. W. 66; *Burns & Smith Lumber Co. v. Doyle*, 71 Conn. 742, 43 Atl. 483, 71 Am. St. Rep. 235. Cf. *Clinch Valley Coal & Iron Co. v. Willing*, 180 Pa. 165, 36 Atl. 737, 57 Am. St. Rep. 626. The rule excluding parol evidence is confined to the parties to the contract, or their privies; and it does not apply as between a party and a stranger. *Clapp v. Banking Co.*, 50 Ohio St. 528, 35 N. E. 308; *Highstone v. Burdette*, 61 Mich. 54, 27 N. W. 852; *Bruce v. Lumber Co.*, 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657; *Fonda v. Burton*, 63 Vt. 355, 22 Atl. 594; *Grove v. Rentch*, 26 Md. 367; *Clerihew v. Bank*, 50 Minn. 538, 52 N. W. 967; *First Nat. Bank v. Dunn*, 55 N. J. Law, 404, 27 Atl. 908; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386.

¹⁹ *Jervis v. Berridge*, 8 Ch. App. 351; *Potter v. Hopkins*, 25 Wend. (N. Y.) 417; *Batterman v. Pierce*, 3 Hill (N. Y.) 171; *Grierson v. Mason*, 60 N. Y. 394; *Holt v. Pie*, 120 Pa. 425, 14 Atl. 389; *Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311; *Raynor v. Drew*, 72 Cal. 307, 13 Pac. 866; *Reynolds v. Hassam*, 56 Vt. 449; *Coates v. Sangston*, 5 Md. 121; *Walter A. Wood Mach. Co. v. Gaertner*, 55 Mich. 453, 21 N. W. 885; *Lash v. Parlin*, 78 Mo. 391; *Bretto v. Levine*, 50 Minn. 168, 52 N. W. 525; *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Peabody v. Bement*, 79 Mich. 47, 44 N. W. 416; *Bank v. Cooper*, 137 U. S. 473, 11 Sup. Ct. 160, 34 L. Ed. 759.

²⁰ *Paul v. Owings*, 32 Md. 402; *Magill v. Stoddard*, 70 Wis. 75, 35 N. W. 346. Where a contract specifies no time, parol evidence of a contemporaneous agreement as to time of payment is admissible. *Horner v. Horner*, 145 Pa. 258, 23 Atl. 441; *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571.

²¹ *Coe v. Hobby*, 72 N. Y. 141, 147, 28 Am. Rep. 120; *Kennebec Co. v. Augusta Ins. & B. Co.*, 6 Gray (Mass.) 204; *Quigley v. De Haas*, 98 Pa. 292; *Smith v. Lilley*, 17 R. I. 119, 20 Atl. 227; *Stallings v. Gottschalk*, 77 Md. 429, 26 Atl. 524; *Bannon v. Aultman*, 80 Wis. 307, 49 N. W. 967, 27 Am. St. Rep. 37; *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. 673.

Again, evidence may be given of a verbal agreement collateral to the written contract, subjecting it to a term unexpressed in its contents; but such a term cannot be enforced if it is contrary to the tenor of the writing.²² "No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a 'collateral agreement,' where the parties have entered into an agreement for a lease, or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved."²³

Explanation of Terms.

Parol evidence is also admissible, where it is necessary in order to explain the terms of a written contract. Explanation of terms may merely amount to evidence of the identity of the parties to the contract, as where two persons have the same name, or where an agent has contracted in his own name, but on behalf of a principal whose name or whose existence he failed to disclose.²⁴ Or, again, it may be

²² *Lindley v. Lacy*, 17 C. B. (N. S.) 578; *Ayer v. Manufacturing Co.*, 147 Mass. 46, 16 N. E. 754; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Bonney v. Morrill*, 57 Me. 368; *Walker v. France*, 112 Pa. 203, 5 Atl. 208; *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; *Palmer v. Roath*, 86 Mich. 602, 49 N. W. 590; *Durkin v. Cobleigh*, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; *Phoenix Pub. Co. v. Clothing Co.*, 54 Minn. 205, 55 N. W. 912; *Keen v. Beckman*, 66 Iowa, 672, 24 N. W. 270.

²³ *Erskine v. Adeane*, 8 Ch. App. 756.

²⁴ *Wake v. Harrop*, 6 Hurl. & N. 768; *Darrow v. Produce Co. (C. C.)* 57 Fed. 463; *Mobberly v. Mobberly*, 60 Md. 376; *Hartzell v. Crumb*, 90 Mo. 629, 3 S. W. 59; *Simpson v. Dix*, 131 Mass. 179; *Martin v. Smith*, 65 Miss. 1, 3 South. 33; *Wakefield v. Brown*, 38 Minn. 361, 37 N. W. 788, 8 Am. St. Rep. 671; *Barkley v. Tarrant*, 20 S. C. 574, 47 Am. Rep. 853; *Rumbough v. Southern Imp. Co.*, 106 N. C. 461, 11 S. E. 528; *Northern Nat. Bank v. Lewis*, 78 Wis. 475, 47 N. W. 834; *Bartlett v. Remington*, 59 N. H. 364; *Haskell v. Tukesbury*, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96. The writing, however, cannot be contradicted as to the parties. Parol evidence, for instance, is not admissible to show that an order reading "Ship to me," and signed "G. G. Bauder," was intended to be the order of the firm of "George G. Bauder & Co." *Osgood v. Bauder*, 82 Iowa, 171, 47 N. W. 1001. An agent who contracts in his own name cannot, to escape liability, show that he intended to bind his principal and not himself. *Higgins v. Senior*, 8 Mees. & W. 834; *Dexter v. Ohlander*, 93 Ala. 441, 9 South. 361; *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28, 21 L. R. A. 135, 36 Am. St. Rep. 895; *Brigham v. Herrick*, 173 Mass. 460, 53 N. E. 906; *Tiffany*, Ag. 234, 356.

a description of the subject-matter of a contract that needs explanation. Where, for instance, persons agreed to buy from another certain wool, which was described as "your wool," and the right of the seller to introduce evidence of the quality and quantity of the wool was disputed, the evidence was held admissible.²⁵

Again, it may be necessary to explain some word or clause in the writing, not describing the subject-matter of the contract, but describing the amount and character of the responsibility which one of the parties takes upon himself as to the conditions of the contract. Where, for instance, a person accepted an order upon him by one who had contracted to do certain work for him, "to be paid out of the last installment," evidence was admitted to show that the meaning of the words quoted was that the order was only to be paid out of the last payment to a certain person provided for in the contract, and that, if that person did not fulfill his contract so that the last payment would become due and payable, there should be no liability on the order.²⁶ So, also, where a vessel is warranted "seaworthy," a house promised to be kept "in tenantable repair," or a thing undertaken to be done in a "reasonable manner," parol evidence is admissible to show the application of these phrases to the subject-matter of the contract, so as to ascertain the intention of the parties. In every policy of marine insurance there is an implied warranty by the assured that the vessel is "seaworthy." In an action on such a policy, evidence was held admissible to show that the word "seaworthy" was understood in a modified sense with reference to the particular vessel and voyage.²⁷

Cases of the sort we have just described are called cases of latent

²⁵ *Macdonald v. Longbottom*, 1 El. & El. 977. And see *Bulkley v. Devine*, 127 Ill. 406, 20 N. E. 16, 3 L. R. A. 330; *Clark v. Coffin Co.*, 125 Ind. 277, 25 N. E. 288; *Thompson v. Stewart*, 60 Iowa, 223, 14 N. W. 247; *Thornell v. City of Brockton*, 141 Mass. 151, 6 N. E. 74; *Busby v. Bush*, 79 Tex. 656, 15 S. W. 638; *Thacker v. Howell* (Ky.) 26 S. W. 719; *Rapley v. Klugh*, 40 S. C. 134, 18 S. E. 680; *Merriam v. United States*, 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531; *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348; *New England Dressed M. & W. Co. v. Standard W. Co.*, 165 Mass. 328, 43 N. E. 112, 52 Am. St. Rep. 516; *Brown v. Markland*, 16 Utah, 360, 52 Pac. 597, 67 Am. St. Rep. 629.

²⁶ *Proctor v. Hartigan*, 143 Mass. 462, 9 N. E. 841. And see *Manchester Paper Co. v. Moore*, 104 N. Y. 680, 10 N. E. 861; *Wickes Bros. v. Electric Light Co.*, 70 Mich. 322, 38 N. W. 299; *Rhodes v. Wilson*, 12 Colo. 65, 20 Pac. 746; *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 550; *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. 419, 34 L. Ed. 1044; *Macdonald v. Dana*, 154 Mass. 152, 27 N. E. 993; *Fawkner v. Wall-Paper Co.* (Iowa) 49 N. W. 1003; *Hurd v. Bovee*, 54 Hun, 635, 7 N. Y. Supp. 241; *Id.*, 134 N. Y. 595, 31 N. E. 624; *Durr v. Chase*, 161 Mass. 40, 36 N. E. 741; *Halladay v. Hess*, 147 Ill. 588, 35 N. E. 380.

²⁷ *Burges v. Wickham*, 3 Best & S. 669. See *Payne v. Haine*, 16 Mees. & W. 541.

ambiguity, as distinguished from patent ambiguities, where words are omitted or contradict one another. In the latter cases explanatory evidence is not admissible. Thus, where a bill of exchange was drawn for one sum in words, and the figures at the top were for a larger amount, evidence was not admitted to show that the bill was intended to be drawn for the latter amount.²⁸

Evidence of Custom and Usage.

Evidence of the custom or usage of a trade, or of a particular locality, is admissible, though it may add a term to a contract, or may attach a special, and sometimes unnatural, meaning to one of the terms expressed.²⁹

Same—To Add a Term to the Contract.

As an instance of a usage which annexes a term to a contract, we may cite the warranty of seaworthiness which by custom is always implied in a contract of marine insurance, though not specially mentioned. So, also, in a case of agricultural customs, a usage that the tenant, quitting his farm at Christmas, was entitled to reap grain sown the preceding autumn, was held in England to be annexed to his lease, though the lease was under seal, and was silent on the subject.³⁰ And in a New York case it was held that, where a contract for excavating city lots was silent as to whom the sand and dirt taken out should belong to, a well-known custom by which it belonged to the excavator, and not to the owner of the lots, might be shown as evidence of the contract.³¹

The principle on which usages are so annexed has been said to rest on the "presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."³²

Same—To Explain Terms.

Proof of custom and usage is also admissible to explain words and phrases in contracts, where they are commercial terms, or otherwise

²⁸ *Sanderson v. Piper*, 5 Bing. N. C. 425.

²⁹ *Wilcox v. Wood*, 9 Wend. (N. Y.) 346; *Rindskoff v. Barrett*, 14 Iowa. 101; *Potter v. Morland*, 3 Cush. (Mass.) 384; *Sampson v. Gazzan*, 6 Port. (Ala.) 123, 30 Am. Dec. 578; *Thompson v. Brannin*, 94 Ky. 490, 21 S. W. 1057; *Swift Iron Works v. Dewey*, 37 Ohio St. 242; *Steamboat Albatross v. Wayne*, 16 Ohio. 513; *Newhall v. Appleton*, 114 N. Y. 140, 21 N. E. 105, 3 L. R. A. 859; *Patterson v. Crowther*, 70 Md. 124, 16 Atl. 531; *Brown Chemical Co. v. Atkinson*, 91 N. C. 389; *McCullough v. Hellwig*, 66 Md. 269, 7 Atl. 455; *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755; *Donovan v. Standard Oil Co.*, 155 N. Y. 112, 49 N. E. 678.

³⁰ *Wigglesworth v. Dollison*, 1 Smith. Lead. Cas. 594.

³¹ *Cooper v. Kane*, 19 Wend. (N. Y.) 386, 32 Am. Dec. 512. And see *Hewitt v. Lumber Co.*, 77 Wis. 548, 46 N. W. 822.

³² *Hutton v. Warren*, 1 Mees. & W. 466; *Appleman v. Fisher*, 34 Md. 540.

subject to known customs. The principle on which such explanation is admitted has been said to be "that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. * * * In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language."³³ As illustrating this rule, in commercial contracts in the case of charter parties in which the days allowed for unloading the ship are to commence "on arrival" at the port of discharge, evidence may be given to show what is commonly understood to be the port; for some ports are of large area, and, by custom "arrival" is understood to mean arriving at a particular spot in the port.³⁴ Another illustration is a case in which a covenant by the lessee of a rabbit warren that he would leave 10,000 rabbits on the warren was explained by evidence of a usage of the locality to mean 12,000, because 1,000 meant 1,200.³⁵

Closely connected with this principle is the admissibility of expert testimony to explain terms of art or technical phrases when used in documents.³⁶

Same—Requisites of Custom or Usage.

In order that a custom or usage may affect a contract, either by adding or explaining terms, it must meet certain requirements.

In the first place, the usage must have been established at the time the contract was made. It need not have existed for any particular length of time, but it must have been recognized as an existing rule, not only up to and at the date of the contract, but for a sufficient time before the contract to have become generally known.³⁷ This rule

³³ *Brown v. Byrne*, 3 El. & Bl. 703, 716. And see *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844; *Myers v. Tibbals*, 72 Cal. 278, 13 Pac. 695; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 7 Atl. 802, 59 Am. Rep. 186; *Packard v. Van Schoick*, 58 Ill. 79; *Long v. Davidson*, 101 N. C. 170, 7 S. E. 758; *Evans v. Manufacturing Co.*, 118 Mo. 548, 24 S. W. 175; *Callahan v. Stanley*, 57 Cal. 476; *Wood v. Allen*, 111 Iowa, 97, 82 N. W. 451; *SEYMOUR v. ARMSTRONG*, 62 Kan. 720, 64 Pac. 612.

³⁴ *Nordon Steam Co. v. Dempsey*, 1 C. P. Div. 654.

³⁵ *Smith v. Wilson*, 3 Barn. & Adol. 728. And see *SOUTIER v. KELLERMAN*, 18 Mo. 569; *McCullough v. Ashbridge*, 155 Pa. 166, 26 Atl. 10; *Hinton v. Locke*, 5 Hill (N. Y.) 437. But see *Sweeney v. Thomason*, 9 Lea (Penn.) 359, 42 Am. Rep. 676; *Wilkinson v. Williamson*, 76 Ala. 163; *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; post, p. 399.

³⁶ *Hill v. Evans*, 31 L. J. Ch. 457; *Dana v. Fielder*, 12 N. Y. 40, 62 Am. Dec. 130; *Fruin v. Railway Co.*, 89 Mo. 397, 14 S. W. 557; *Gauch v. Insurance Co.*, 88 Ill. 251, 30 Am. Rep. 554; *Jones v. Anderson*, 82 Ala. 302, 2 South. 911; *Welsh v. Hueckstein*, 152 Pa. 27, 25 Atl. 138; *City of Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090.

³⁷ *Adams v. Otterback*, 15 How. 539, 14 L. Ed. 805; *Wilson v. Bauman*, 80 Ill. 493; *Packard v. Van Schoick*, 58 Ill. 79; *Ulmer v. Farnsworth*, 80 Me. 500, 15 Atl. 65; *Hall v. Storrs*, 7 Wis. 253; *Ambler v. Phillips*,

that the usage must have been established includes several other rules which have sometimes been stated separately, namely, that it must have been uniform and certain,³⁸ continued,³⁹ and peaceable and acquiesced in.⁴⁰

Another rule which is included in this is that a usage must be general. If it is not so, it cannot be regarded as obligatory on the parties unless it is expressly shown that they knew of it, and contracted with reference to it.⁴¹ A particular bank, for instance, could not alone, by adopting a rule governing its own business, thereby establish a usage which would be obligatory on all persons dealing with it.⁴² It might be established, however, by all the banks in a certain city, or all the tradesmen in a particular line of business. Though confined to a single city, it would be sufficiently general to be obligatory on all persons in that city.⁴³ Even here, however, it would scarcely be binding on persons living at a distance, unless it were shown affirmatively that they knew of it.⁴⁴

It is a general rule that the usage must have been known to the parties;⁴⁵ but, if a usage is established and is general, it is presumed

132 Pa. 167, 19 Atl. 71; *Thompson v. Hamilton*, 12 Pick. (Mass.) 425, 23 Am. Dec. 619; *Smith v. Wright*, 1 Caines (N. Y.) 43, 2 Am. Dec. 162; *Cooper v. Berry*, 21 Ga. 526, 6 Am. Dec. 468; *Buford v. Tucker*, 44 Ala. 89.

³⁸ *Foley v. Mason*, 6 Md. 37; *Hibbard v. Peek*, 75 Wis. 619, 44 N. W. 641; *Vos v. Robinson*, 9 Johns. (N. Y.) 192; *Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534; *Minis v. Nelson* (C. C.) 43 Fed. 777; *Illinois Masons' Benevolent Soc. v. Baldwin*, 86 Ill. 479; *Smith v. Hess*, 83 Iowa, 238, 48 N. W. 1030; *Berkshire Woolen Co. v. Proctor*, 7 Cush. (Mass.) 417; *The Harbinger* (D. C.) 50 Fed. 941; *Desha v. Holland*, 12 Ala. 513, 46 Am. Dec. 261; *Wallace v. Morgan*, 23 Ind. 399.

³⁹ *Johnson v. Stoddard*, 100 Mass. 306; *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440; *Brent v. Cook*, 12 B. Mon. (Ky.) 267; *Walker v. Barron*, 6 Minn. 508 (Gil. 353).

⁴⁰ *Dixon v. Dunham*, 14 Ill. 324; *Strong v. Railroad Co.*, 15 Mich. 205, 93 Am. Dec. 184; *McMasters v. Railroad Co.*, 69 Pa. 374, 8 Am. Rep. 264.

⁴¹ *Patterson v. Crowther*, 70 Md. 124, 16 Atl. 531; *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *Lamb v. Henderson*, 63 Mich. 302, 29 N. W. 732.

⁴² *Adams v. Otterback*, 15 How. 539, 14 L. Ed. 805.

⁴³ *Renner v. Bank*, 9 Wheat. 587, 6 L. Ed. 166; *Mills v. Bank*, 11 Wheat. 431, 6 L. Ed. 512.

⁴⁴ *German American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 11 South. 117, 16 L. R. A. 291; *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510; *Simon v. Johnson*, 101 Ala. 368, 13 South. 491.

⁴⁵ *Bliven v. Screw Co.*, 23 How. 420, 16 L. Ed. 510; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; *Dawson v. Kittle*, 4 Hill (N. Y.) 197; *Martin v. Hall*, 26 Mo. 386; *Martin v. Maynard*, 16 N. H. 165; *Murray v. Brooks*, 41 Iowa, 45; *Sugart v. Mays*, 54 Ga. 554; *Janney v. Boyd*, 30 Minn. 319, 15 N. W. 308; *Scott v. Whitney*, 41 Wis. 504; *Dodge v. Favor*, 15 Gray (Mass.) 82; *Sawtelle v. Drew*, 122 Mass. 228; *Marshall v. Perry*, 67 Me. 78.

to have been known to them, and is obligatory without affirmative proof of knowledge, and even in case of ignorance.⁴⁶ If it is not a general usage, then it must be affirmatively shown that the parties had knowledge of the usage, and contracted with reference to it.⁴⁷ In order that a usage may be binding, it must have been actually or presumptively known to both of the parties, and not merely to the party who is sought to be charged by it. Want of knowledge of a local usage on the part of one of them shows that it could not have entered into the contract.⁴⁸

It is also essential that a usage shall be consistent with rules of law, for "a universal usage cannot be set up against the general law."⁴⁹ If it is inconsistent with any rule of the common law,⁵⁰ or with any statute,⁵¹ or is contrary to public policy,⁵² it cannot be recognized. A usage, however, is not contrary to rules of law in this sense, merely because it makes the law applicable to the particular contract different from what it would be if the usage were not imported into the contract. This is generally the object and the natural effect of proving a usage.

⁴⁶ *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Bailey v. Bensley*, 87 Ill. 556; *Blake v. Stump*, 73 Md. 160, 20 Atl. 988, 10 L. R. A. 103; *Carter v. Coal Co.*, 77 Pa. 286; *Ford v. Tirrell*, 9 Gray (Mass.) 401, 69 Am. Dec. 297; *Howard v. Walker*, 92 Tenn. 452, 21 S. W. 897; *Austrian v. Springer*, 94 Mich. 343, 54 N. W. 50; *Hostetter v. Park*, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568.

⁴⁷ *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510; *Sleght v. Hartshorne*, 2 Johns. (N. Y.) 532; *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 573; *Pennell v. Transportation Co.*, 94 Mich. 247, 53 N. W. 1049; *Brunnell v. Sawmill Co.*, 86 Wis. 587, 57 N. W. 364.

⁴⁸ *Nonotuck Silk Co. v. Fair*, 112 Mass. 354; *Chateaugay Ore & Iron Co. v. Blake*, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510.

⁴⁹ *Meyer v. Dremer*, 11 C. B. (N. S.) 646.

⁵⁰ *First Nat. Bank v. Taliaferro*, 72 Md. 164, 19 Atl. 364; *Dickinson v. Gay*, 7 Allen (Mass.) 29, 83 Am. Dec. 656; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671; *Inglebright v. Hammond*, 19 Ohio, 337, 53 Am. Dec. 430; *Globe Milling Co. v. Elevator Co.*, 44 Minn. 153, 46 N. W. 306; *Marshall v. Perry*, 67 Me. 78.

⁵¹ *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 6 N. E. 114; *Maury v. Iron Co.*, 9 Paige (N. Y.) 188; *Cayzer v. Taylor*, 10 Gray (Mass.) 274, 69 Am. Dec. 317; *Cutler v. Howe*, 122 Mass. 541; *Mansfield v. Inhabitants*, 15 Gray (Mass.) 149; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *McCrary v. McFarland*, 93 Ind. 466. Proof of usage cannot give a different meaning to terms than that given by statute. *Green v. Moffett*, 22 Mo. 529; *Rogers v. Allen*, 47 N. H. 529. Nor can proof of usage change the statutory duties of an officer. *Scribner v. Town of Hollis*, 48 N. H. 30; *Delaplane v. Crenshaw*, 15 Grat. (Va.) 457; *Frazier v. Warfield*, 13 Md. 279. Nor can violation of usury laws be justified by usage. *Gore v. Lewis*, 109 N. C. 539, 13 S. E. 909; *Dunham v. Gould*, 16 Johns. (N. Y.) 367, 8 Am. Dec. 321; *Greene v. Tyler*, 39 Pa. 361.

⁵² *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66.

A usage cannot be set up to affect a contract if it is unreasonable or oppressive.⁵³ A usage of agents, for instance, in collecting drafts for absent parties, to surrender them to the drawees at maturity, and, upon mere confidence in the good credit of the drawees, to take in exchange their checks upon banks, was held ineffectual because unreasonable.⁵⁴

Finally, the usage must not be inconsistent with the terms of the contract, for it is optional with the parties to exclude the usage if they think fit, and to frame their contract so as to be repugnant to its operation.⁵⁵

In Equity.

In the application of equitable remedies, the granting or refusal of specific performance, the reformation of documents, or their rescission and cancellation, extrinsic evidence is much more freely admitted than at law. For instance, though, as we have seen, a man is ordinarily bound by the terms of an offer unequivocally expressed, and accepted in good faith, evidence has been admitted to show that the offer was made by inadvertence. Thus, where a person, immediately after dispatching an offer to sell several plots of land for a round sum, discovered that by a mistake in adding up the prices of the plots he had offered them for less than he intended, and informed the other party of the mistake without delay, but not before the latter had concluded the contract by acceptance, the court allowed the mistake to be shown, and refused specific performance, leaving the person to whom the offer was made to such remedy by way of damages as he could obtain in the common-law courts.⁵⁶

⁵³ *Seccomb v. Insurance Co.*, 10 Allen (Mass.) 305; *Blackburn v. Mason*, 4 Reports, 297, 68 Law T. 510; *Minis v. Nelson* (C. C.) 43 Fed. 777; *Central R. Co. v. Anderson*, 58 Ga. 393; *Pennsylvania Coal Co. v. Sanderson*, 94 Pa. 302; *Boardman v. Spooner*, 13 Allen (Mass.) 353, 90 Am. Dec. 196; *Strong v. Railroad Co.*, 15 Mich. 206, 93 Am. Dec. 184; *Anderson v. Whitaker*, 97 Ala. 690, 11 South. 919; *Nolte v. Hill*, 36 Ohio St. 186; *Rosenstock v. Tormey*, 32 Md. 169, 3 Am. Rep. 125; *Haskins v. Warren*, 115 Mass. 514; *Merchants' Ins. Co. v. Prince*, 50 Minn. 53, 52 N. W. 131, 36 Am. St. Rep. 626.

⁵⁴ *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762.

⁵⁵ *Blackett v. Assurance Co.*, 2 Crompt. & J. 244; *BROWN v. FOSTER*, 113 Mass. 136, 18 Am. Rep. 463; *Randolph v. Halden*, 44 Iowa, 327; *Greenstine v. Borchard*, 50 Mich. 434, 15 N. W. 540, 45 Am. Rep. 51; *Seavey v. Shurick*, 110 Ind. 494, 11 N. E. 597; *Wolff v. Campbell*, 110 Mo. 114, 19 S. W. 622; *O'Donohue v. Leggett*, 134 N. Y. 40, 31 N. E. 269; *Baltimore Baseball Club & Exhibition Co. v. Pickett*, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304; *Holloway v. McNear*, 81 Cal. 154, 22 Pac. 514; *Gilbert v. McGinnis*, 114 Ill. 28, 28 N. E. 382; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Partridge v. Insurance Co.*, 15 Wall. 573, 21 L. Ed. 229; *Globe Milling Co. v. Elevator Co.*, 44 Minn. 153, 46 N. W. 306; *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579.

⁵⁶ *Webster v. Cecil*, 30 Beav. 62. See *McCusker v. Spier*, 72 Conn. 628, 45 Atl. 1011.

Again, where a parol contract has been reduced to writing, or where a contract for a sale or lease of lands has been performed by the execution of a lease or conveyance, evidence may be admitted to show that a term of the contract is not the real agreement of the parties; and this is done for two purposes, and under two sets of circumstances.

Where a contract has been reduced to writing, or a deed executed, in pursuance of a previous agreement, and the writing or deed, owing to mutual mistake, fails to express the intention of the parties, a court of equity will rectify or reform the written instrument in accordance with their true intent; and this may be done even though the parties cannot be placed in the position they occupied when the contract was made.⁵⁷ In such cases, extrinsic, and, if necessary, parol evidence will be admitted to show the true intent of the parties. There must have been a genuine agreement;⁵⁸ its terms must have been expressed under mutual mistake;⁵⁹ and the evidence must be clear and convincing.

Where the mistake was not mutual, extrinsic evidence is only admitted in certain cases which appear to be regarded as having something of the character of fraud,⁶⁰ and is admitted for the purpose of offering to the party seeking to profit by the mistake an option of abiding by a corrected contract, or having the contract annulled. Instances of such cases are where the mistake of one party was caused by the other, though not with any fraudulent intent, and was known to him before his position had been affected by the contract.⁶¹ In these cases it is probable that the court will not reform or correct the instrument unless the parties can be placed in statu quo.

⁵⁷ *Beauchamp v. Winn*, L. R. 6 H. L. 232; *Murray v. Parker*, 19 Beav. 305.

⁵⁸ *MacKensie v. Coulson*, L. R. 8 Eq. 368.

⁵⁹ *Fowler v. Fowler*, 4 De Gex & J. 250; *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152; *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550; *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; *Spurr v. Home Ins. Co.*, 40 Minn. 424, 42 N. W. 206; *King v. Holbrook*, 38 Or. 452, 63 Pac. 651; *Eaton*, Eq. 620.

⁶⁰ Equity has jurisdiction to reform where there is mistake on one side caused by fraud on the other. *Fishack v. Ball*, 34 W. Va. 644, 12 S. E. 856; *Bush v. Merriman*, 87 Mich. 260, 49 N. W. 866; *Kyle v. Fehley*, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866; *Snell v. Insurance Co.*, 98 U. S. 85, 91, 25 L. Ed. 52; *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874.

⁶¹ *Garrard v. Frankel*, 30 Beav. 445; *Harris v. Pepperell*, L. R. 5 Eq. 1; *Moffett, H. & C. Co. v. City of Rochester*, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108. Cf. *Trenton Terra Cotta Co. v. Shingle Co.* (C. C.) 80 Fed. 46.

RULES OF CONSTRUCTION.

Thus far we have dealt with the admissibility of evidence in relation to contracts in writing. We now come to deal with the rules of construction which govern the interpretation of the contract as it is proven to have been made between the parties.

SAME-GENERAL RULES.

218. The three general rules of construction are that:

- (a) Words are to be understood in their plain and literal meaning, but—

EXCEPTIONS—(1) Evidence of usage may vary the usual meaning of words.

(2) Technical words are to be given their technical meaning.

(3) The rule is subject to the following rules as to giving effect to the intention of the parties.

- (b) An agreement should receive that construction which will best effectuate the intention of the parties.

- (c) The intention of the parties is to be collected from the whole agreement.

219. Subsidiary to these rules are the following, tending to the same end—that is, the effecting of the intention of the parties:

- (a) Obvious mistakes of writing or grammar, including punctuation, will be corrected.

- (b) The meaning of general words will be restricted by more specific and particular descriptions of the subject-matter to which they apply.

- (c) A contract susceptible of two meanings will be given the meaning which will render it valid.

- (d) A contract will, if possible, be construed so as to render it reasonable rather than unreasonable.

- (e) Words will generally be construed most strongly against the party who used them.

- (f) In case of doubt, weight will be given the construction placed upon the contract by the parties.

- (g) Where there is a conflict between printed and written words, the latter will control.

(1) The first general rule is that words are to be understood in their plain and literal meaning; and this rule is followed, though the consequences may not have been in the contemplation of the parties.⁶²

⁶² Hawes v. Smith, 12 Me. 429; Bullock v. Lumber Co. (Cal.) 31 Pac. 367; Mansfield & S. City R. Co. v. Veeder, 17 Ohio, 385; Hall v. Bank, 53 Md. 120; Taylor v. Turley, 33 Md. 500; Pillsbury v. Locke, 33 N. H. 96, 66 Am. Dec. 711; Holmes v. Hall, 8 Mich. 66, 77 Am. Dec. 444; Stettauer v. Hamlin, 97 Ill. 312; Bradshaw v. Bradbury, 64 Mo. 334; Willmering v. McGaughey, 30 Iowa, 205, 6 Am. Rep. 673; Smith v. Bank, 171 Mass. 178, 50 N. E. 545; Fitzgerald v. Bank, 114 Fed. 474, 52 C. C. A. 276. While parties to a contract

The rule, however, is subject to the qualification that a particular custom or usage, which, as we have seen, may be proven, may vary the usual meaning of words;⁶³ and that technical words are to be given their technical meaning.⁶⁴ It is also subject to the rules, which we will now explain, as to giving effect to the intention of the parties.

(2, 3) The second and third rules may be mentioned together, namely, that an agreement ought to receive that construction which will best effectuate the intention of the parties; and this intention must be collected, not from detached parts of the agreement, but from the whole agreement.⁶⁵ "Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent."⁶⁶ Where the intention clearly ap-

are entitled to its literal performance, when practicable, that does not mean that courts and juries shall give to the terms of a contract, however clear and unmistakable the ordinary significance of the words employed, a meaning which, when applied to the subject-matter of the contract, will render performance impossible. *Columbus Const. Co. v. Crane Co.*, 98 Fed. 946, 40 C. C. A. 35.

⁶³ Ante, p. 396.

⁶⁴ Ante, p. 396. *Findley's Ex'rs v. Findley*, 11 Grat. (Va.) 434; *Ellmaker v. Ellmaker*, 4 Watts (Pa.) 89; *Maryland Coal Co. v. Railroad Co.*, 41 Md. 343; *Eaton v. Smith*, 20 Pick. (Mass.) 150; *McAvoy v. Long*, 13 Ill. 147; *Rindskoff v. Barrett*, 14 Iowa, 101.

⁶⁵ *Mallan v. May*, 13 Mees. & W. 511, 517; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; *Gray v. Clark*, 11 Vt. 583; *Heywood v. Perrin*, 10 Pick. (Mass.) 228, 20 Am. Dec. 518; *Field v. Leiter*, 118 Ill. 17, 6 N. E. 877; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Walsh v. Trevanion*, 15 Q. B. 733; *Bell v. Bruen*, 1 How. 169, 11 L. Ed. 89; *Armstrong v. Granite Co.*, 147 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683; *German Fire Ins. Co. v. Roost*, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; *Sattler v. Hallock*, 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. Rep. 686. Where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other; and the different parts of one instrument will be read together. *Wood v. College*, 114 Ind. 320, 16 N. E. 619; *Morss v. Salisbury*, 48 N. Y. 636; *Thomson v. Beal* (C. C.) 48 Fed. 614; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Pensacola Gas Co. v. Lotze*, 23 Fla. 368, 2 South. 609; *Hagerty v. White*, 69 Wis. 317, 34 N. W. 92; *Sutton v. Beckwith*, 68 Mich. 303, 36 N. W. 79, 13 Am. St. Rep. 344; *Bailey v. Railroad Co.*, 17 Wall. 96, 21 L. Ed. 611; *Joy v. City of St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; *HUNT v. LIVERMORE*, 5 Pick. (Mass.) 395; *Pierce v. Tidwell*, 81 Ala. 299, 2 South. 15; *Freer v. Lake*, 115 Ill. 662, 4 N. E. 512; *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; *American Gas & Oil Min. Co. v. Wood*, 90 Me. 516, 38 Atl. 548, 43 L. R. A. 449.

⁶⁶ *FORD v. BEACH*, 11 Q. B. 852, 866; *Chesapeake & O. Canal Co. v. Hill*, 15 Wall. 94, 9 L. Ed. 222; *Hoffman v. Insurance Co.*, 32 N. Y. 405, 88 Am. Dec. 337; *Walker v. Douglas*, 70 Ill. 445; *Collins v. Lavelle*, 44 Vt. 230; *First Nat. Bank v. Gerke*, 68 Md. 449, 13 Atl. 358, 6 Am. St. Rep. 453; *Hunter's Adm'rs v. Miller's Ex'rs*, 6 B. Mon. (Ky.) 612; *Gage v. Tirrell*, 9 Allen (Mass.) 299; *Ullmann v. Railway Co.*, 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949. If it clearly appears that a word was used inadvertently,

pears from the words used, there is no need to go further, for in such a case the words must govern; or, as it is sometimes said, where there is no doubt, there is no room for construction.⁶⁷ But, if the meaning is not clear, the court will consider the circumstances under which the contract was made, the subject-matter, the relation of the parties, and the object of the agreement, in order to ascertain their intention, and for this purpose, as we have seen, parol evidence is admissible.⁶⁸

These rules seem to be in conflict with the rule first stated. Taking them together they come substantially to this: that men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal meaning would bear. The courts will not make an agreement for the parties, but will ascertain what their agreement was, if not by its general purport, then by the literal meaning of its words.

Subsidiary Rules.

(1) Courts will correct obvious mistakes in writing and grammar.⁶⁹ This rule includes another, namely, that the punctuation of a document,

or is inconsistent with the real intention, it will be rejected. *Wells v. Tregusan*, 2 Salk. 463; *Dollman v. King*, 4 Bing. (N. C.) 105; *Buck v. Burk*, 18 N. Y. 337; *Stockton v. Turner*, 7 J. J. Marsh. (Ky.) 192; *Hibbard v. McKindley*, 28 Ill. 240; *Iredell v. Barbee*, 31 N. C. 250.

⁶⁷ *Dwight v. Insurance Co.*, 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729; *Canterberry v. Miller*, 76 Ill. 355; *Noyes v. Nichols*, 28 Vt. 159; *Williamson v. McClure*, 37 Pa. 402; *Armstrong v. Granite Co.*, 47 N. Y. 495, 42 N. E. 186, 49 Am. St. Rep. 683; *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099; *Abraham v. Railroad*, 37 Or. 495, 60 Pac. 899, 82 Am. St. Rep. 779.

⁶⁸ *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689, and authorities there cited. And see *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Caperton's Adm'rs v. Caperton*, 36 W. Va. 479, 15 S. E. 257; *Penfold v. Insurance Co.*, 85 N. Y. 317, 39 Am. Rep. 660; *Wilson v. Roots*, 119 Ill. 379, 10 N. E. 204; *Kuecken v. Voltz*, 110 Ill. 264; *Lacy v. Green*, 84 Pa. 514; *Excelsior Needle Co. v. Smith*, 61 Conn. 56, 23 Atl. 693; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; *Gillett v. Bank*, 160 N. Y. 549, 55 N. E. 292; *Hull Coal & Coke Co. v. Coke Co.*, 113 Fed. 256, 51 C. C. A. 213. Thus, where a policy of marine insurance excepted the time "while the vessel is at Baker's Island loading," and the vessel was lost while there, but before it had begun to load, it was held, after evidence of the dangerous character of the place, that the intention of the parties was to except the time while the vessel was there for the purpose of loading, and not merely while it was actually loading. *Reed v. Insurance Co.*, 95 U. S. 23, 24 L. Ed. 348.

⁶⁹ *Wilson v. Wilson*, 5 H. L. Cas. 40, 66; *Watson v. Blaine*, 12 Serg. & R. (Pa.) 131, 14 Am. Dec. 669; *Monmouth Park Ass'n v. Iron Works*, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; *Atwood v. Cobb*, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; *Harman v. Howe*, 27 Grat. (Va.) 676; *Caldwell v. Layton*, 44 Mo. 220; *Knisely v. Shenberger*, 7 Watts (Pa.) 193; *Fowler v. Woodward*, 26 Minn. 347, 4 N. W. 231; *Cowles Electric Smelting & Aluminum Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616; *City of Garden City v. Heller*, 61 Kan. 767, 60 Pac. 1000.

though it may aid in determining the meaning, will not control or change a meaning which is plain from a consideration of the whole document and the circumstances.⁷⁰

(2) The court will restrict the meaning of general words by more specific and particular descriptions of the subject-matter to which they are to apply.⁷¹

(3) Where a particular word, or the contract as a whole, is susceptible of two meanings, one of which will render the contract valid, and the other of which will render it invalid, the former will be adopted so as to uphold the contract. Thus, where a document was expressed to be given "in consideration of your being in advance" to a person, and it was argued that this showed a past consideration which would not support the promise, the court held that the words "being in advance" might mean a prospective advance, and be equivalent to "in consideration of your becoming in advance," or "on condition of your being in advance."⁷² So, also, where a contract is susceptible of two constructions, one of which will render it unlawful as being in violation of law or contrary to public policy, that construction which will render it lawful will be adopted.⁷³

(4) If possible without going contrary to the manifest intention of the parties, a contract will be so construed as to render it reasonable rather than unreasonable.⁷⁴

⁷⁰ *White v. Smith*, 33 Pa. 186, 75 Am. Dec. 589; *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624; *English's Ex'r v. McNair's Adm'rs*, 34 Ala. 40; *Osborn v. Farwell*, 87 Ill. 89, 29 Am. Rep. 47; *Holmes v. Insurance Co.*, 98 Fed. 240, 39 C. C. A. 45, 47 L. R. A. 308. See *Joy v. City of St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 251, 34 L. Ed. 843.

⁷¹ *Phillips v. Barber*, 5 Barn. & Ald. 161; *Cullen v. Butler*, 5 Maule & S. 461; *Stettauer v. Hamlin*, 97 Ill. 312; *Dawes v. Prentice*, 16 Pick. (Mass.) 435; *Emery v. Fowler*, 38 Me. 99; *Vaughan v. Porter*, 16 Vt. 266; *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677, 35 L. Ed. 314; *Richmond Ice Co. v. Ice Co.*, 99 Va. 239, 37 S. E. 851.

⁷² *HAIIGH v. BROOKS*, 10 Adol. & E. 326. And see *Atwood v. Cobb*, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; *Anderson v. Baughman*, 7 Mich. 69, 74 Am. Dec. 699; *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682; *Field v. Leiter*, 118 Ill. 17, 6 N. E. 877; *Gano v. Aldridge*, 27 Ind. 294; *Reilly v. Chouquette*, 18 Mo. 220; *Hunter v. Anthony*, 53 N. C. 385, 80 Am. Dec. 333; *Saunders v. Clark*, 29 Cal. 299; *Wells v. Atkinson*, 24 Minn. 161.

⁷³ *Archibald v. Thomas*, 3 Cow. (N. Y.) 281; *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583; *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940; *United States v. Railroad Co.*, 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173; *Lorillard v. Clyde*, 86 N. Y. 384; *Horton v. Rohlf* (Neb.) 95 N. W. 36.

⁷⁴ *Atwood v. Emery*, 1 C. B. (N. S.) 110; *Russell v. Allerton*, 108 N. Y. 288, 15 N. E. 391; *Wilson v. Marlow*, 66 Ill. 385; *Town of Roylton v. Turnpike Co.*, 14 Vt. 311; *Bickford v. Cooper*, 41 Pa. 142; *Gillet v. Bank*, 160 N. Y. 549, 55 N. E. 292; *Pressed Steel Car Co. v. Railway Co.*, 121 Fed. 999, 57 C. C. A. 635.

(5) The courts will construe words most strongly against the party who used them. Words in an offer, for instance, will be construed most strongly against the proposer, and words in an acceptance most strongly against the acceptor; words in a promissory note most strongly against the maker; words in a policy of insurance most strongly against the insurer; and words in a conveyance, particularly of exception or reservation, most strongly against the grantor.⁷⁶ The principle on which this rule is based has been said to be that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage.⁷⁶

The liability of a guarantor or surety is said to be *stricti juris*, and is to be determined by the strict interpretation of the words used, and cannot be extended by implication.⁷⁷ Such contracts are nevertheless

⁷⁶ *Barney v. Newcomb*, 9 Cush. 46; *Noonan v. Bradley*, 9 Wall. 394, 19 L. Ed. 757; *Jackson v. Gardner*, 8 Johns. (N. Y.) 308; *Duryea v. Mayor*, etc., 62 N. Y. 592; *Varnum v. Thruston*, 17 Md. 471; *Richardson v. People*, 85 Ill. 495; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *Waterman v. Andrews*, 14 R. I. 589; *Hill v. Manufacturing Co.*, 79 Ga. 105, 3 S. E. 445; *Phoenix Ins. Co. v. Slaughter*, 12 Wall. 404, 20 L. Ed. 444; *American Surety Co. v. Pauly*, 170 U. S. 160, 18 Sup. Ct. 552, 42 L. Ed. 987; *Snyder v. Insurance Co.*, 59 N. J. Law, 544, 37 Atl. 1022, 59 Am. St. Rep. 625; *Wilson v. Cooper* (C. C.) 95 Fed. 625; *Bowser v. Patrick* (Ky.) 65 S. W. 824. The rule does not apply where it would cause a penalty or forfeiture. A condition in a bond, for instance, is construed most strongly against the obligee. *Butler v. Wigge*, 1 Saund. 65; *Hoffman v. Insurance Co.*, 32 N. Y. 405, 88 Am. Dec. 337; *Bennehan v. Webb*, 28 N. C. 57; *Chicago, B. & Q. R. Co. v. City of Aurora*, 99 Ill. 205. But a grant from the government is construed most strongly against the grantee. *Canal Com'rs v. People*, 5 Wend. (N. Y.) 423, 459; 2 Bl. Comm. 347; *Raleigh & G. R. Co. v. Reid*, 64 N. C. 155; *Mayor, etc., of Allegheny v. Railroad Co.*, 26 Pa. 355; *Hartford Bridge Co. v. Ferry Co.*, 29 Conn. 210; *Northwestern Fertilizing Co. v. Village of Hyde Park*, 70 Ill. 634; *Mayor, etc., of City of New York v. Railroad Co.*, 97 N. Y. 275, 281. It is said, however, that this "rule of construction has been applied to gratuitous grants made by the sovereign of property, franchises, and privileges, upon the solicitation of the grantee," but that it does not apply, "certainly not in its full extent, to grants made for the benefit of the sovereign upon adequate valuable consideration paid to the sovereign for the thing granted." *Langdon v. Mayor, etc.*, 93 N. Y. 132. And see *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 7 Pick. (Mass.) 344, 485; *Garrison v. U. S.*, 7 Wall. 688, 19 L. Ed. 277.

⁷⁶ *Fowkes v. Association*, 3 B. & S. 929; *Gillet v. Bank*, 160 N. Y. 594, 55 N. E. 292. A party must be deemed to have assented to a contract in the sense in which he knew the other intended it to signify, if the language is capable of that meaning. *Cowles Electric Smelting & Aluminum Co. v. Lowrey*, 79 Fed. 331, 24 C. C. A. 616. See, also, *Leete v. Mining Co.* (C. C.) 88 Fed. 957; *Wood v. Allen*, 111 Iowa, 97, 82 N. W. 451; *People's Bldg. Ass'n v. Klauber* (Iowa) 95 N. W. 1072.

⁷⁷ *Douglass v. Reynolds*, 7 Pet. 125, 8 L. Ed. 626; *People v. Backus*, 117

to be interpreted reasonably and according to the intention of the parties.⁷⁸ And if the contract is fairly susceptible of two interpretations, and the other party has acted upon the interpretation most favorable to his rights, it seems that such interpretation will prevail.⁷⁹

(6) Where the meaning of the terms used is clear, the fact that the parties have themselves, by their subsequent conduct or otherwise, placed an erroneous construction upon them, will not prevent the court from giving the true construction;⁸⁰ but, where the meaning is doubtful, such construction by the parties is of great weight in determining the true meaning, and in some cases may be controlling.⁸¹

(7) Where, as in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the latter will control.⁸²

Terms Implied—Unexpressed Intention.

Certain terms, though unexpressed, are imported into the contract by law without proof that they were intended by the parties. Unless a contrary intention was expressed, the law conclusively presumes

N. Y. 196, 22 N. E. 759; Markland Min. & Mfg. Co. v. Kimmel, 87 Ind. 560; Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 N. E. 232; Hopewell v. McGrew, 50 Neb. 789, 70 N. W. 397; Sherman v. Mulloy, 174 Mass. 41, 54 N. E. 345, 75 Am. St. Rep. 286.

⁷⁸ People v. Lee, 104 N. Y. 441, 10 N. E. 884; Powers v. Clarke, 127 N. Y. 417, 28 N. E. 402; Hooper v. Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496; Northern Light Lodge v. Kennedy, 7 N. D. 146, 73 N. W. 524.

⁷⁹ Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326; Smith v. Molleson, 148 N. Y. 241, 42 N. E. 669; London & S. F. Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64.

⁸⁰ Railroad Co. v. Trimble, 10 Wall. 367, 19 L. Ed. 948; Holston Salt & Plaster Co. v. Campbell, 89 Va. 396, 16 S. E. 274; Hershey v. Luce, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6; St. Paul & D. R. Co. v. Blackmar, 44 Minn. 514, 47 N. W. 172; Citizens' Fire Ins., Security & Land Co. v. Doll, 35 Md. 89, 6 Am. Rep. 360; Russell v. Young, 94 Fed. 45, 36 C. C. A. 71; Menage v. Rosenthal, 175 Mass. 358, 56 N. E. 579.

⁸¹ French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680; Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110; Mitchell v. Wedderburn, 68 Md. 139, 11 Atl. 760; Hosmer v. McDonald, 80 Wis. 54, 49 N. W. 112; Leavitt v. Investment Co., 4 C. C. A. 425, 54 Fed. 439; People's Natural Gas Co. v. Wire Co., 155 Pa. 22, 25 Atl. 749; Hill v. City of Duluth, 57 Minn. 231, 58 N. W. 992; People v. Murphy, 119 Ill. 159, 6 N. E. 488; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526; City of Cincinnati v. Coke Co., 53 Ohio St. 278, 41 N. E. 239; Childers v. Bank, 147 Ind. 430, 46 N. E. 825; Hale v. Sheehan, 52 Neb. 184, 71 N. W. 1019; Long-Bell Lumber Co. v. Stump, 86 Fed. 574, 30 C. C. A. 260.

⁸² Clark v. Woodruff, 83 N. Y. 518; Chadsey v. Guion, 97 N. Y. 333; Thornton v. Railroad Co., 84 Ala. 109, 4 South. 197, 5 Am. St. Rep. 337; Hernandez v. Insurance Co., 6 Blatchf. 317, Fed. Cas. No. 6415; Murray v. Pillsbury, 59 Minn. 85, 60 N. W. 844; Breyman v. Railroad Co. (C. C.) 85 Fed. 579; City of Chicago v. Weir, 165 Ill. 582, 46 N. E. 725; Commonwealth Title Ins. & Trust Co. v. Ellis, 192 Pa. 321, 43 Atl. 1034, 73 Am. St. Rep. 816;

that they intended to make them a part of their contract. "The unexpressed obligations in these instances, which are implied by law, are those which are inherent in the transaction according to its true nature, and may be regarded as the unexpressed intention of the parties. * * * It is generally said that contracts will be construed according to the intention of the parties. But this means, not only what they did actually intend, but also what, according to the essential nature of the particular transaction, the law considers that they should have intended. No intention can, however, be read into a contract unless it is thus a necessary legal implication. * * * When a particular kind of contract is made, it is presumed that the parties intended to embody all the legal consequences of the act, whether they knew of them or not, unless it can be seen from the language they used that they intended to exclude some of them."⁸³

This principle is illustrated by an ordinary contract of sale. In all such contracts, in the absence of expression to the contrary, it is conclusively presumed that the seller intended to stipulate that he had the title to the property and the right to sell it. These implied stipulations are called "implied warranties." Though unexpressed, they are imported into the contract by implication of law.

SAME-RULES AS TO TIME.

220. At common law, time is always of the essence of a contract; but in equity it is otherwise, unless it was intended by the parties to make time of the essence, and their intention is expressed or to be implied. In the absence of such intention, the rule is that a reasonable time was meant. In some jurisdictions, by statute, the rule at law is the same as in equity.

When the contract fixes no time for performance, the contract is to be construed as allowing a reasonable time.⁸⁴ What is a reasonable time is a question to be determined in view of all the circumstances which may have been supposed reasonably to have been in contemplation of the parties.⁸⁵

Sprague Electric Co. v. Board of Com'rs, 83 Minn. 262, 86 N. W. 332 (writing and typewriting). See, also, *Sturn v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

⁸³ *Brantly*, Cont. 178, 179; *Genet v. Canal Co.*, 136 N. Y. 593, 32 N. E. 1078, 19 L. R. A. 127; *Rioux v. Brick Co.*, 72 Vt. 148, 47 Atl. 406.

⁸⁴ *Ellis v. Thompson*, 3 Mees. & W. 445; *Pope v. Manufacturing Co.*, 107 N. Y. 61, 13 N. E. 592; *Boyd v. Gunnison*, 14 W. Va. 11; *Griffin v. Ogletree*, 114 Ala. 343, 21 South. 488; *Rogers v. Barr*, 97 Ga. 10, 25 S. E. 339; *Eppens, Smith & Wiemann Co. v. Littlejohn*, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811.

⁸⁵ *Ellis v. Thompson*, 3 Mees. & W. 445; *Pinney v. Railroad Co.*, 19 Minn. 251 (Gil. 211); *Stange v. Wilson*, 17 Mich. 312; *Coon v. Spaulding*, 47 Mich.

Where the contract fixes a time for performance, the time, at common law, is always of the essence of the contract; that is to say, if a person promises another to do a certain thing by a certain day, in consideration that the latter will do something for him, the thing must be done by the date named, or the latter is discharged from his promise. Courts of equity, however, look further into the intention of the parties, so as to ascertain whether, in fact, the performance of the contract by one party was meant to depend upon the other party's promise being fulfilled by the day named therefor, or whether a day was named merely in order to secure performance within a reasonable time. If the latter was found to be the intention of the parties, equity would not refuse to enforce the contract if the promise required to be so performed was performed within a reasonable time.⁸⁶ It is always open to the parties, however, even in equity, to make time of the essence of the contract.⁸⁷ In some of the states, even where time is expressly declared to be of the essence of the contract, courts of equity will disregard the stipulation if its enforcement would be unconscionable.⁸⁸

In England, and in some of our states, the distinction in this respect

162, 10 N. W. 183; *Stewart v. Marvel*, 101 N. Y. 357, 4 N. E. 743; *McFadden v. Henderson*, 128 Ala. 221, 29 South. 640.

⁸⁶ *Maltby v. Austin*, 65 Wis. 527, 27 N. W. 162; *Bellas v. Hays*, 5 Serg. & R. (Pa.) 427, 9 Am. Dec. 385; *Moote v. Scriven*, 33 Mich. 500; *Andrews v. Sullivan*, 2 Gilman (Ill.) 327, 43 Am. Dec. 53; *Garretson v. Vanloon*, 3 G. Greene (Iowa) 128, 54 Am. Dec. 492; *Taylor v. Baldwin*, 27 Ga. 438, 73 Am. Dec. 736; *THURSTON v. ARNOLD*, 43 Iowa, 43; *Austin v. Wacks*, 30 Minn. 335, 15 N. W. 409. See *Anson, Cont.* (8th Ed.) 269.

⁸⁷ *Lennon v. Napper*, 2 Schrales & L. 682; *Barnard v. Lee*, 97 Mass. 92; *Carter v. Phillips*, 144 Mass. 100, 10 N. E. 500; *Kemp v. Humphreys*, 13 Ill. 573; *Potter v. Tuttle*, 22 Conn. 512; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; *Wells v. Smith*, 7 Paige (N. Y.) 22, 31 Am. Dec. 274; *Grigg v. Landis*, 21 N. J. Eq. 494; *Scott v. Fields*, 7 Ohio, 90, pt. 2; *Reed v. Breeden*, 61 Pa. 460; *Grey v. Tubbs*, 43 Cal. 359; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Young v. Daniels*, 2 Iowa, 126, 63 Am. Dec. 477; *Bullock v. Adams' Ex'rs*, 20 N. J. Eq. 367; *Jewett v. Black*, 60 Neb. 173, 82 N. W. 375. Even where time is expressly declared to be of the essence, it may be waived by the conduct of the party for whose benefit the stipulation is made; as where he recognizes the contract as in force after the time for performance has passed, or directs changes making a longer time necessary. *Brown v. Safe-Deposit Co.*, 128 U. S. 414, 9 Sup. Ct. 127, 32 L. Ed. 468; *PHILLIPS & COLBY CONST. CO. v. SEYMOUR*, 91 U. S. 646, 23 L. Ed. 341; *Amoskeag Mfg. Co. v. U. S.*, 17 Wall. 592, 21 L. Ed. 715; *Paddock v. Stout*, 121 Ill. 571, 13 N. E. 182; *Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. 450. If the party prevents performance by the other, he cannot insist on the stipulation. *Damm v. Fuller*, 120 N. Y. 554, 24 N. E. 815; *King Iron Bridge & Mfg. Co. v. City of St. Louis (C. C.)* 43 Fed. 768, 10 L. R. A. 826; *Rees v. Logsdon*, 68 Md. 93, 11 Atl. 768; *Ward v. Matthews*, 73 Cal. 13, 14 Pac. 604; *post*, § 464.

⁸⁸ *Richmond v. Robinson*, 12 Mich. 193; *Volz v. Grummett*, 49 Mich. 453, 13 N. W. 814; *Austin v. Wacks*, 30 Minn. 335, 15 N. W. 409; *Quinn v. Reath*, 37 Conn. 16; *Ballard v. Cheney*, 19 Neb. 58, 26 N. W. 587.

between the rules of law and equity has been swept away by statutes declaring, substantially, that stipulations in contracts as to time or otherwise, which would not theretofore have been deemed as of the essence of such contracts in a court of equity, should receive in all courts the same construction and effect as they would have received in equity.

Where time is not made of the essence of the contract by express stipulation, it may nevertheless be held to have been intended from the nature of the contract.⁸⁹ In mercantile contracts, such as contracts for the manufacture and sale of goods, it is generally held that time is of the essence; and, where a term of the contract provides for the time of shipment or delivery, shipment or delivery at the time fixed will usually be regarded as a condition precedent, on the failure of which the other party may repudiate the whole contract.⁹⁰ In contracts for the sale of land, or for the performance of services, or the construction of buildings, and the like, time will be held of the essence if, from the nature of the property and the circumstances, it seems that the parties must have so intended, but generally, in such contracts, time is not of the essence.⁹¹

⁸⁹ NEW YORK LIFE INS. CO. v. STATHAM, 93 U. S. 24, 23 L. Ed. 789; COLEMAN v. APPELGARTH, 68 Md. 21, 11 Atl. 284, 6 Am. St. Rep. 417; Cabot v. Kent, 20 R. I. 197, 37 Atl. 945; Savannah Ice Delivery Co. v. Transit Co., 110 Ga. 142, 35 S. E. 280; Rioux v. Brick Co., 72 Vt. 148, 47 Atl. 406.

⁹⁰ Bowes v. Shand, 2 App. Cas. 455; Jones v. U. S., 96 U. S. 24, 24 L. Ed. 644; NORRINGTON v. WRIGHT, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Cleveland Rolling-Mill Co. v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; Cromwell v. Wilkinson, 18 Ind. 365; Camden Iron-Works v. Fox (C. C.) 34 Fed. 200; Scarlett v. Stein, 40 Md. 512; Lefferts v. Weld, 167 Mass. 531, 46 N. E. 107; Hull Coal & Coke Co. v. Coke Co., 113 Fed. 256, 51 C. C. A. 213. Cf. Coyne v. Avery, 189 Ill. 378, 59 N. E. 788. But it seems that, unless a contrary intention appears, stipulations as to the time of payment are not usually to be deemed of the essence. Martindale v. Smith, 1 Q. B. 389, 395; MERSEY STEELE & IRON CO. v. NAYLOR, 9 App. Cas. 434, 444; Monarch Cycle Mfg. Co. v. Wheel Co., 105 Fed. 324, 44 C. C. A. 523; West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. See NORRINGTON v. WRIGHT, *supra*, per Gray, J.

⁹¹ Brown v. Safe-Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; Goldsmith v. Guild, 10 Allen (Mass.) 239; Green v. Covillaud, 10 Cal. 317, 70 Am. Dec. 725; Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; Young v. Daniels, 2 Iowa, 126, 63 Am. Dec. 477; Derrett v. Bowman, 61 Md. 526; Beck & Pauli Lithographing Co. v. Elevator Co., 3 C. C. A. 248, 52 Fed. 700; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. Ed. 384; Hambly v. Railroad Co. (C. C.) 21 Fed. 541.

SAME—RULES AS TO PENALTIES AND LIQUIDATED DAMAGES.

221. If the parties fix upon a certain sum to be paid on breach of the contract,
- (a) It may be recovered if it was really fixed upon as liquidated damages for nonperformance. This is subject to the rules of construction stated below.
 - (b) But, if it was intended in the nature of a penalty in excess of any loss likely to be sustained, the recovery will be limited to the loss actually sustained.
222. In determining whether the sum named is a penalty or liquidated damages, these rules may be stated:
- (a) The courts will not be guided by the name given to it by the parties.
 - (b) If the matter of the contract is of certain value, a sum in excess of that value is a penalty.
 - (c) If the matter is of uncertain value, the sum fixed is liquidated damages.
 - (d) If a debt is to be paid by installments, it is no penalty to make the whole debt due on nonpayment of an installment.
 - (e) If some terms of the contract are of certain value, and some are not, and the penalty is applied to a breach of any one of them, it is not recoverable as liquidated damages.⁹²

Where the parties to a contract affix a sum certain to be paid on the nonperformance of his promise by one or each of them, they may have intended (1) to assess the damages at which they rated the nonperformance of the promise, or (2) to secure its performance by imposing a penalty in excess of the actual loss likely to be sustained. If the former can, according to the rules to be presently mentioned, reasonably be construed to have been their intention, the sum named is recoverable as "liquidated damages," on breach of the promise. If the latter was their actual or presumed intention, the amount recoverable is limited to the loss actually sustained. Formerly, this rule existed only in equity, but for a long time it has been also applied in the courts of law.⁹³

Rules of Construction.

In construing contracts in which such a term is introduced, the courts will not be guided by the name given to the sum to be paid. If it is liquidated damages, they will enforce it, though erroneously called a "penalty," and, on the other hand, if it is in the nature of a penalty, they will not allow it to be enforced, although designated "liquidated damages."⁹⁴

⁹² Anson, Cont. (4th Ed.) 256.

⁹³ Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. Ed. 384.

⁹⁴ Ward v. Building Co., 125 N. Y. 230, 26 N. E. 256; Bagley v. Peddie,

(1) If the contract is for a matter of certain value, or value easily ascertainable, and a sum in excess of that value is fixed to be paid on breach of it, the sum so fixed is a penalty, and not liquidated damages.⁹⁵

(2) If the contract is for a matter of uncertain value, and a sum is fixed to be paid on breach of it, and is not, on the face of the contract, so greatly in excess of the probable damage as to show that the parties could not have fixed upon it otherwise than as a penalty, the sum is recoverable as liquidated damages. There is "nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree."⁹⁶ If the stipulation is so construed, the plaintiff is limited to the amount named, though his actual damages may be greater.⁹⁷

Courts lean against forfeiture, and towards construing stipulations

16 N. Y. 469, 69 Am. Dec. 713; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. 820, 13 L. R. A. 671; *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *Cheddick's Ex'r v. Marsh*, 21 N. J. Law, 463; *BIGNALL v. GOULD*, 119 U. S. 495, 7 Sup. Ct. 294, 30 L. Ed. 491; *Sanford v. Bank*, 94 Iowa, 680, 63 N. W. 459; *J. G. Wagner Co. v. Cawker*, 112 Wis. 532, 88 N. W. 599.

⁹⁵ *Clements v. Railroad Co.*, 132 Pa. 445, 19 Atl. 274; *Brennan v. Clark*, 29 Neb. 385, 45 N. W. 472; *Willson v. City of Baltimore*, 83 Md. 203, 34 Atl. 774, 55 Am. St. Rep. 339.

⁹⁶ *KEMBLE v. FARREN*, 6 Bing. 147; *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805; *Maxwell v. Allen*, 78 Me. 32, 2 Atl. 386, 57 Am. Rep. 783; *Keeble v. Keeble*, 85 Ala. 552, 5 South. 149; *Cushing v. Drew*, 97 Mass. 445; *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865; *Fasler v. Beard*, 39 Minn. 32, 38 N. W. 755; *Lansing v. Dodd*, 45 N. J. Law, 525; *Trower v. Elder*, 77 Ill. 452; *Morse v. Rathburn*, 42 Mo. 598, 97 Am. Dec. 359; *Pennypacker v. Jones*, 106 Pa. 237; *May v. Crawford*, 142 Mo. 390, 44 S. W. 260; *City of New Britain v. Telephone Co.*, 74 Conn. 326, 50 Atl. 881; *Pressed Steel Car Co. v. Railroad Co.*, 121 Fed. 609, 57 C. C. A. 635. Stipulation in building contract for payment by contractor of certain sum for each day that work remains uncompleted after certain day construed as liquidated damages. *Legge v. Harlock*, 12 Q. B. 1015; *Fletch v. Dyche*, 2 Term R. 32; *Hall v. Crowley*, 5 Allen (Mass.) 304, 81 Am. Dec. 745; *Ward v. Building Co.*, 125 N. Y. 230, 26 N. E. 256; *Monmouth Park Ass'n v. Iron Works*, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; *Lincoln v. Granite Co.*, 56 Ark. 405, 19 S. W. 1056; *De Graff v. Wickham*, 89 Iowa, 720, 52 N. W. 503; *Fruin v. Railway Co.*, 89 Mo. 397, 14 S. W. 557; *Texas & St. L. Ry. Co. v. Rust* (C. C.) 19 Fed. 239; *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267; *Curtis v. Van Bergh*, 161 N. Y. 47, 55 N. E. 398; *Kunkel v. Wherry*, 189 Pa. 198, 42 Atl. 112, 69 Am. St. Rep. 802; *Illinois Cent. R. Co. v. Cabinet Co.*, 164 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729, 78 Am. St. Rep. 933; *Drumheller v. Surety Co.*, 30 Wash. 530, 71 Pac. 25; *Malone v. City of Philadelphia*, 147 Pa. 416, 23 Atl. 628. But see, contra, where the stipulation was greatly in excess of any possible damage from the delay. *Cochran v. Railway Co.*, 113 Mo. 359, 21 S. W. 6; *Clements v. Railroad Co.*, 132 Pa. 445, 19 Atl. 276; *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490.

⁹⁷ *Winch v. Ice Co.*, 86 N. Y. 618; *Welch v. McDonald*, 85 Va. 500, 8 S. E. 711.

for liquidated damages as penalties, when the amount on the face of the contract is out of all proportion to the possible loss; and many courts declare that the parties, even if they intended to fix upon the amount stipulated as liquidated damages, will nevertheless be limited to the recovery of actual damages if the amount stipulated for is so greatly in excess of the actual damages that it is in effect a penalty. In other words, the real question is "not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties." The intention of the parties cannot alter it."⁹⁸ Other courts, on the other hand, maintain that in such cases the intention of the parties must govern, and that whether a stipulation to pay a sum of money is to be treated as a penalty or as an agreed ascertainment of damages is to be determined by the contract, fairly construed; it being the duty of the court always, where the damages are uncertain and have been liquidated by agreement, to enforce the contract.⁹⁹ "It may, we think, fairly be stated," it was said in a late case in the supreme court of the United States,¹⁰⁰ "that when a claimed disproportion has been asserted in actions at law it has usually been an excessive disproportion between the stipulated sum and the possible damages resulting from a trivial breach apparent on the face of the contract, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether bona fide to fix the damages, or to stipulate the payment of an arbitrary sum as a penalty, by way of security."

(3) If a debt is to be paid by installments, it is not imposing a penalty to provide that on default in any one payment the entire balance of unpaid installments shall fall due.¹⁰¹

⁹⁸ *Jaquith v. Hudson*, 5 Mich. 123. See, also, *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527; *Brewster v. Edgerly*, 13 N. H. 275; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716; *Colwell v. Lawrence*, 38 N. Y. 71. "The intention is not all controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely demands it." *Streeper v. Williams*, 48 Pa. 450.

⁹⁹ *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366. See, also, *Brooks v. City of Wichita*, 114 Fed. 297, 52 C. C. A. 209; *Wood v. Paper Co.*, 121 Fed. 818, 58 C. C. A. 256; *Taylor v. Newspaper Co.*, 83 Minn. 523, 86 N. W. 760, 85 Am. St. Rep. 473; *Knox Rock Blasting Co. v. Stone Co.*, 64 Ohio St. 361, 60 N. E. 563; *Emery v. Boyle*, 200 Pa. 249, 49 Atl. 779; *GARST v. HARRIS*, 177 Mass. 72, 58 N. E. 174; *Guerin v. Stacy*, 175 Mass. 595, 56 N. E. 892.

¹⁰⁰ *Sun Printing & Publishing Ass'n v. Moore*, 183 U. S. 642, 672, 22 Sup. Ct. 240, 46 L. Ed. 366.

¹⁰¹ *Protector Loan Co. v. Grice* (Ct. App.) 5 Q. B. Div. 592; *Dean v. Nelson*,

(4) If the contract contains a number of terms, some of which are of a certain value, or if it contains a number of terms of widely different value, and the penalty is applied to a breach of any one of them, it is not recoverable as liquidated damages, however strongly the parties may have expressed their intention that it shall be so.¹⁰² In a leading case on this point the defendant had agreed to act, and conform to all the regulations, at plaintiff's theater for several seasons. the plaintiff to pay him £3. 6s. 8d. for every night that the theater should be open for performance, and it was agreed that, for a breach of any term of the agreement by either party, the one in default should pay the other £1,000, which sum was thereby declared to be "liquidated and ascertained damages, and not a penalty." The court held that, in spite of the explicit statement of the parties that the sum was not to be regarded as a penalty, it must be so regarded. If the penal clause had been limited to breaches uncertain in their nature and amount, it might, as was thought, have had the effect of ascertaining the damages; "but," it was said, "in the present case the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3. 6s. 8d. per day, or, on the other hand, the defendant had refused to conform to any usual regulation of the theater, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement." ¹⁰³

10 Wall. 158, 19 L. Ed. 926. So of a stipulation that, if interest is not paid, the principal shall become due. *Schooley v. Romain*, 31 Md. 574, 100 Am. Dec. 87; *Mobray v. Leckie*, 42 Md. 474.

¹⁰² *KEMBLE v. FARREN*, 6 Bing. 141; *Carter v. Strom*, 41 Minn. 522, 43 N. W. 394; *Watts v. Camors*, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; *McPherson v. Robertson*, 82 Ala. 459, 2 South. 333; *Lampman v. Cochran*, 16 N. Y. 275; *Wilhelm v. Eaves*, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297; *Hough v. Kugler*, 36 Md. 186; *Daily v. Litchfield*, 10 Mich. 29; *Trustees of First Orthodox Congregational Church v. Walrath*, 27 Mich. 232; *Trower v. Elder*, 77 Ill. 452; *Lyman v. Babcock*, 40 Wis. 503; *Monmouth Park Ass'n v. Warren*, 55 N. J. Law. 598, 27 Atl. 932.

¹⁰³ *KEMBLE v. FARREN*, 6 Bing. 141.

SAME—JOINT AND SEVERAL CONTRACTS.

223. Whether or not a contract with several persons on either or both sides is to be construed as joint or several depends upon the intention of the parties as manifested in the evidence of their agreement.¹⁰⁴ The following rules may be stated:

LIABILITIES—(a) A promise by two or more in the plural number is *prima facie* joint, while a promise in the singular is *prima facie* several; but this presumption will yield if, from the whole agreement, a contrary intention appears.

(b) Subscriptions by a number of persons to promote some common enterprise, though joint in form, are several promises.

RIGHTS—If the words will admit of it, the contract, as regards the promisees, will be joint or several, according as their interest is joint or several.

Joint and Several Liabilities.

In all written contracts, the language used is the primary guide to the meaning; but it is not always conclusive. The language is sometimes ambiguous, and often not exclusive of an intention to contract either way. In such cases the sense must be derived from the interests and relations of the parties as appearing in the contract.¹⁰⁵ The same is true of oral contracts where there is no direct evidence of the intention. Wherever the promise is by two or more persons, as where the words "we promise," etc., are used, the liability is *prima facie* joint; but the use of such expressions will not make the promise joint if, from the whole instrument, a contrary intention appears.¹⁰⁶ Where the promise is in the singular, the liability is *prima facie* several; but, as in other cases, the whole instrument may show a contrary intention, and this intention must govern.¹⁰⁷

In the case of subscriptions by a number of persons to promote some common enterprise, the promises, though joint in form, are held to be several. Each subscriber is held to promise severally to pay the amount

¹⁰⁴ 1 Pars. Cont. 10; Hall v. Leigh, 8 Cranch, 50, 3 L. Ed. 484; Olmstead v. Bailey, 35 Conn. 584; Eastman v. Wright, 6 Pick. (Mass.) 316; WILLOUGHBY v. WILLOUGHBY, 5 N. H. 244; BOGGS v. CURTIN, 10 Serg. & R. (Pa.) 211; Elliott v. Bell, 37 W. Va. 834, 17 S. E. 399.

¹⁰⁵ KEIGHTLEY v. WATSON, 3 Exch. 710; Streichen v. Fehleisen, 112 Iowa, 612, 84 N. W. 715, 51 L. R. A. 412.

¹⁰⁶ KING v. HOARE, 13 Mees. & W. 494; Bartlett v. Robbins, 5 Mete. (Mass.) 184; Ehle v. Purdy, 6 Wend. (N. Y.) 629; New Haven & N. Co. v. Hayden, 119 Mass. 361; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 43 Atl. 723, 46 L. R. A. 255, 78 Am. St. Rep. 612; McArthur v. Board, 119 Iowa, 562, 93 N. W. 580.

¹⁰⁷ MARCH v. WARD, Peake, 130; Dill v. White, 52 Wis. 456, 9 N. W. 404; Fond du Lac Harrow Co. v. Haskins, 51 Wis. 135, 8 N. W. 15; Van Alstyne v. Van Slyck, 10 Barb. (N. Y.) 387; Hemmenway v. Stone, 7 Mass. 58, 5 Am. Dec. 27; Slater v. Magraw, 12 Gill & J. (Md.) 265.

of his subscription, and an action against all the subscribers jointly will not lie. It clearly appears from the character of such a contract that each subscriber only intends to bind himself for his own subscription, and this intention must prevail, notwithstanding the joint form of the promise.¹⁰⁸

As we have seen, these rules are to a great extent modified by statute in most of the states.¹⁰⁹

Joint and Several Rights.

With respect to the rights of several persons under such contracts, the rule of construction has been thus stated:¹¹⁰ "A contract will be construed to be joint or several, according to the interests of the parties, if the words are capable of that construction, or even if not inconsistent with it. If the words are ambiguous, or will admit of it, the contract will be joint if the interest be joint, and it will be several if the interest be several.¹¹¹ But a contract entered into with several persons, in respect of the same matter or interest, cannot by any words be made so as to entitle them both jointly and severally."¹¹²

¹⁰⁸ Davis v. Belford, 70 Mich. 120, 37 N. W. 919; Hall v. Thayer, 12 Metc. (Mass.) 130; Davis & Rankin Bldg. & Mfg. Co. v. Barber (C. C.) 51 Fed. 148; Chicago Bldg. & Mfg. Co. v. Graham, 78 Fed. 83, 23 C. C. A. 657; Davis & Rankin Bldg. & Mfg. Co. v. Booth, 10 Ind. App. 364, 37 N. E. 818; Cornish v. West, 82 Minn. 107, 84 N. W. 750, 52 L. R. A. 355. And see Waddy Bluegrass Creamery Co. v. Manufacturing Co., 103 Ky. 579, 45 S. W. 895. Contra, Davis v. Shafer (C. C.) 50 Fed. 764.

¹⁰⁹ Ante, p. 379.

¹¹⁰ Leake, Cont. 218.

¹¹¹ Eccleston v. Clipsham, 1 W. Saund. 153; SORSBIE v. PARK, 12 Mees. & W. 146; Pickering v. De Rochemont, 45 N. H. 67; Gould v. Gould, 6 Wend. (N. Y.) 263; Appleton v. Bascom, 3 Metc. (Mass.) 169; Capen v. Barrows, 1 Gray (Mass.) 376; Lombard v. Cobb, 14 Me. 222; Duncan v. Willis, 51 Ohio St. 433, 38 N. E. 13; Pennville Natural Gas & Oil Co. v. Thomas 21 Ind. App. 1, 51 N. E. 351; Montana Min. Co. v. Milling Co., 19 Mont. 313, 48 Pac. 305; Curry v. Railway Co., 58 Kan. 6, 48 Pac. 579. Where two persons are accepted as depositors by a savings bank, and both sign the depositors' book, and the moneys are made payable to either, the contract is with both jointly, and has the incident of survivorship. Dunn v. Houghton (N. J. Ch.) 51 Atl. 71.

¹¹² Ante, p. 384, note 133.

CHAPTER XI.

DISCHARGE OF CONTRACT.

- 224. In General.
- 225-226. By Agreement—In General.
- 227-228. Waiver, Cancellation, or Rescission.
- 229-230. Substituted Contract.
- 231. Form of Discharge by New Agreement.
- 232. Conditions Subsequent.
- 233. By Performance—In General.
- 234. Payment.
- 235. Tender.
- 236-237. By Breach—In General.
- 238. Forms of Discharge by Breach.
- 239-240. Renunciation of Contract.
- 241. Impossibility Created by Party.
- 242. Breach by Failure of Performance.
- 243-244. Independent Promises.
- 245-249. Conditional Promises.
- 250. By Impossibility of Performance.
- 251. By Operation of Law.
- 252. Merger.
- 253. Alteration of Written Instrument.
- 254. Proceedings in Bankruptcy.
- 255. Remedies on Breach of Contract.
- 256-259. Damages.
- 260. Specific Performance.
- 261. Discharge of Right of Action.
- 262. By the Consent of the Parties.
- 263. By Judgment.
- 264-265. By Lapse of Time.

IN GENERAL.

224. The modes in which a contract may be discharged are as follows:

- (a) **By agreement.**
- (b) **By performance.**
- (c) **By breach.**
- (d) **By impossibility of performance.**
- (e) **By operation of law.**

It remains to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. In dealing with this part of the subject we shall consider, not only the mode in which the original contract may be discharged, but, in case of its being discharged by breach, the mode in which the right of action arising thereupon may be extinguished.¹

¹ Anson, Cont. (4th Ed.) 257.

DISCHARGE OF CONTRACT BY AGREEMENT.

- 225. A contract may be discharged by an agreement to that effect between the parties. This may be—**
- (a) By waiver, cancellation, or rescission.**
 - (b) By a substituted contract.**
 - (c) By the happening of conditions subsequent, expressed or implied in the contract.**
- 226. Such an agreement must possess all the elements requisite to the formation of any other valid agreement. There are some exceptions as to the necessity for consideration, which will be hereafter noticed.**

As it is their agreement which binds the parties, so by their agreement they may be loosed from the contractual tie. It is scarcely necessary to say that to render an agreement effective as a discharge it must be a valid agreement; and, to be so, it must be accompanied by all the elements, such as communication of mutual intention, real consent, parties having capacity, etc.²

SAME—WAIVER, CANCELLATION, OR RESCISSION.

- 227. A contract may be discharged by an express agreement that it shall no longer bind either party. This process is called a waiver, cancellation, or rescission of the contract.³**
- 228. A consideration is necessary to support such an agreement, except:**
- EXCEPTIONS—(a) Where the agreement is under seal.**
- (b) A negotiable instrument may be discharged by its mere surrender with an intent to discharge it.**

In the absence of a consideration, a promise to forego the right to demand performance of a contract would be nudum pactum and void. It has often been said that "a simple contract may, before breach, be waived or discharged without a deed and without consideration;" but this is inaccurate. A consideration, or a deed dispensing with the necessity for a consideration, is always essential. Where the contract is wholly executory, a mere agreement between the parties, that it shall no longer bind them, is valid, for the discharge of each by the other from his liabilities under the contract is a sufficient consideration for

² *Murray v. Harway*, 56 N. Y. 337; *Wheeler v. Railroad Co.*, 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. Ed. 341; *Stix v. Roulston*, 88 Ga. 743, 15 S. E. 826; *O'Donnell v. Brand*, 85 Wis. 97, 55 N. W. 154; *WOOD v. MORIARTY*, 16 R. I. 201, 14 Atl. 855; *Lauer v. Lee*, 42 Pa. 165; *Smith v. Watson*, 82 Va. 712, 1 S. E. 96.

³ *Anson, Cont.* (4th Ed.) 258-260.

the promise of the other to forego his rights.⁴ If the agreement is not mutual,—that is, if it is a waiver of his rights by one party only,—there is no consideration, and the agreement is void.⁵ If a contract has been executed on one side, an agreement that it shall no longer be binding, without more, is void for want of consideration.⁶ To illustrate these distinctions: If a person agrees to buy goods from another, or to perform services for him, and the other agrees to pay therefor, the contract may be discharged by a simple agreement to that effect, so long as the goods or services have not been delivered or performed, and the money has not been paid. After performance on either side, however, a promise by the party so performing not to require performance by the other would not be binding unless under seal or supported by a consideration.

—In England there is an exception to this rule in the case of bills of exchange and promissory notes. The rights of the holder of such instruments may there be waived and discharged without any consideration for their waiver.⁷ In this country the exception is not recognized. Such instruments, in this respect, stand on the same footing as any other simple contract,⁸ with this exception, namely, that, if the instrument itself is destroyed or surrendered for the purpose of discharging the debt, it will so operate without any consideration.⁹ The reason for the exception is that there is a valid executed gift of the instrument.¹⁰

⁴ *ROLLINS v. MARSH*, 128 Mass. 116; *Cutter v. Cochrane*, 116 Mass. 408; *Blood v. Enos*, 12 Vt. 625, 36 Am. Dec. 363; *Kelly v. Bliss*, 54 Wis. 187, 11 N. W. 488; *Blagborne v. Hunger*, 101 Mich. 375, 59 N. W. 657; *Perkins v. Hoyt*, 35 Mich. 506; *Flegal v. Hoover*, 156 Pa. 276, 27 Atl. 162; *Farrar v. Toliver*, 88 Ill. 408; *Hobbs v. Brick Co.*, 157 Mass. 109, 31 N. E. 756; *Windham v. Doles*, 59 Ga. 265; *Brown v. Lumber Co.*, 117 N. C. 287, 23 S. E. 253; ante, p. 127.

⁵ *King v. Gillett*, 7 Mees. & W. 55.

⁶ *COLLYER v. MOULTON*, 9 R. I. 90, 98 Am. Dec. 370; *Crawford v. Millsbaugh*, 13 Johns. (N. Y.) 87; *KIDDER v. KIDDER*, 33 Pa. 268; *Moore v. Locomotive Works*, 14 Mich. 266; *Maness v. Henry*, 96 Ala. 454, 11 South. 410; *Landon v. Hutton*, 50 N. J. Eq. 500, 25 Atl. 953; *Davidson v. Burke*, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; ante, p. 129.

⁷ *Foster v. Dawber*, 6 Exch. 839.

⁸ *Crawford v. Millsbaugh*, 13 Johns. (N. Y.) 87; *Seymour v. Minturn*, 17 Johns. (N. Y.) 169, 8 Am. Dec. 380; *Bragg v. Danielson*, 141 Mass. 195, 4 N. E. 622; *Smith v. Bartholomew*, 1 Mete. (Mass.) 276, 25 Am. Dec. 365; *Campbell's Estate*, In re, 7 Pa. 100, 47 Am. Dec. 503.

⁹ *Larkin v. Hardenbrook*, 90 N. Y. 333, 43 Am. Rep. 176; *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. 168; *Vanderbeck v. Vanderbeck*, 30 N. J. Eq. 265; *Paxton v. Wood*, 77 N. C. 11; *Campbell's Estate*, In re, 7 Pa. 100, 47 Am. Dec. 503; *Albert's Ex'rs v. Ziegler's Ex'rs*, 29 Pa. 50; *Stewart v. Hidden*, 13 Minn. 43 (Gil. 29); *Ellsworth v. Fogg*, 35 Vt. 355.

¹⁰ *Slade v. Mutrie*, 156 Mass. 19, 30 N. E. 168.

SAME—SUBSTITUTED CONTRACT.

229. A contract may be discharged by the substitution of a new contract,¹¹ and this results—

- (a) **Where a new contract is expressly substituted for the old one.**
- (b) **Where a new contract is inconsistent with the old one.**
- (c) **Where new terms are agreed upon.**
- (d) **Where a new party is substituted for one of the original parties by agreement of all three.**

230. As in the case of contracts generally, the agreement of the parties may be evidenced by their conduct.

The difference between this mode and a discharge by waiver is that a discharge by waiver is a total obliteration of the contract, while by this mode a new bond between the parties is substituted in the place of the old one. A contract may be thus discharged either by the making of an entirely new and independent contract relating to the same subject, or merely by the introduction of new terms. In the latter case the new contract consists of the new terms and so much of the original contract as remains unchanged. If, for instance, parties who have contracted for the construction of a building according to specifications, and at a price, to be paid partly in cash and partly in some other way, should afterwards agree upon a change in the specifications and an increase in the cash payment, there would be substituted for the original contract a new contract, consisting of the new terms and the unchanged terms of the original.¹²

A new contract inconsistent with the original impliedly discharges the latter without an express provision to that effect;¹³ and, if new terms are agreed upon, they will by implication waive those terms of the original which are inconsistent with them, and a new contract will result, consisting, as we have seen, of the new terms and the unchanged

¹¹ *McCREERY v. DAY*, 119 N. Y. 1, 23 N. E. 198; *MUNROE v. PERKINS*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; *Hurlock v. Smith*, 39 Md. 436; *King v. Faist*, 161 Mass. 449, 37 N. E. 456; *ROLLINS v. MARSH*, 128 Mass. 116; *Cutter v. Cochrane*, 116 Mass. 408; *Farrar v. Toliver*, 88 Ill. 408; *Windham v. Doles*, 59 Ga. 265; *Brown v. Everhard*, 52 Wis. 205, 8 N. W. 725; *Tingley v. Land Co.*, 9 Wash. 34, 36 Pac. 1098; *Sioux City Stock-Yards Co. v. Packing Co.*, 110 Iowa, 396, 81 N. W. 712; *Andre v. Graebner*, 126 Mich. 116, 85 N. W. 464; *Brown v. Lumber Co.*, 117 N. C. 287, 23 S. E. 253; *Dreifus v. Exposition Salvage Co.*, 194 Pa. 475, 45 Atl. 370, 75 Am. St. Rep. 704. As to payment by negotiable instrument, see post, p. 435.

¹² *Green v. Paul*, 155 Pa. 126, 25 Atl. 867; *Hannibal H. Chandler & Co. v. Knott*, 86 Iowa, 113, 53 N. W. 88; *McNish v. Reynolds*, 95 Pa. 483.

¹³ *Patmore v. Colburn*, 1 Crompt. M. & R. 65; *Renard v. Sampson*, 12 N. Y. 561; *Stow v. Russell*, 36 Ill. 18; *Howard v. Railroad Co.*, 1 Gill (Md.) 311; *Chrisman v. Hodges*, 75 Mo. 413; *Paul v. Meservey*, 58 Me. 419; *Harrison v. Lodge*, 116 Ill. 279, 5 N. E. 543; *Domenico v. Association (D. C.)* 112 Fed. 554, 557.

or consistent terms of the original contract.¹⁴ An illustration is furnished by cases in which a contractor undertakes building operations for another which are to be completed by a certain time, in default of which a sum is to be paid as compensation for the delay. If, while the building is in progress, an agreement is made for additional work, by which it becomes impossible to complete the building within the time stipulated, it is universally held that the subsequent agreement is so far inconsistent with the first as to amount to a waiver of the original stipulation as to time; and, since an agreement may be made by conduct as well as by words, this principle would apply where performance within the specified time is prevented by the conduct of the other party.¹⁵

Where it is claimed that a contract has been discharged by a new contract, or by the introduction of new terms, the intention to discharge must distinctly appear, to give rise to such an implication, from the inconsistency of the new terms with the old ones.¹⁶ A mere postponement of performance for the convenience of one of the parties, or an agreement to accept performance at a different place than that stipulated, does not operate as a discharge.¹⁷ This question sometimes arises in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, and then refuses to accept the goods at all, alleging that the contract was discharged by the alteration of the time of performance; that a new contract was thereby substituted, which is void for noncompliance with the statute of frauds. The courts, however, have always recognized "the distinction between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another,"¹⁸ and will not regard the latter as affecting the rights of the parties further than this: that, if a man asks to have performance of his contract postponed, he does so at his own

¹⁴ THORNHILL v. NEATS, 8 C. B. (N. S.) 831; Teal v. Bilby, 123 U. S. 572, 8 Sup. Ct. 239, 31 L. Ed. 263; Cornish v. Suydam, 39 Ala. 620, 13 South. 118; Farrar v. Toliver, 88 Ill. 408; ROLLINS v. MARSH, 128 Mass. 116; ROGERS v. ROGERS, 139 Mass. 440, 1 N. E. 122; Housekeeper Pub. Co. v. Swift, 97 Fed. 290, 38 C. C. A. 187.

¹⁵ THORNHILL v. NEATS, 8 C. B. (N. S.) 831. And see Cornish v. Suydam, 39 Ala. 620, 13 South. 118; Stewart v. Keteltas, 36 N. Y. 388; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Howard v. Railroad Co., 1 Gill (Md.) 311; Huckestein v. Kelly, 152 Pa. 631, 25 Atl. 747.

¹⁶ Millsaps v. Bank, 71 Miss. 361, 13 South. 903; Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749.

¹⁷ HICKMAN v. HAYNES, L. R. 10 C. P. 606; Lawson v. Hogan, 93 N. Y. 39; Watkins v. Hodges, 6 Har. & J. (Md.) 38; Franklin Fire Ins. Co. v. Hamill, 5 Md. 170; Bacon v. Cobb, 45 Ill. 47; McCombs v. McKennan, 2 Watts & S. (Pa.) 216, 37 Am. Dec. 505; Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13.

¹⁸ HICKMAN v. HAYNES, L. R. 10 C. P. 606.

risk; for, if the market value of the goods which he should have accepted at the earlier date has altered at the latter date, the rate of damages may be assessed, as against him, either at the time when the performance should have taken place, or when, by nonperformance, the contract was broken, or when he ultimately exhausted the patience of the vendor, and definitely refused to perform the contract.¹⁹

Again, a contract may be discharged by the introduction of new parties into the original agreement, whereby a new contract is created, in which the terms remain the same, but the parties are different. This is termed a "novation." We have already spoken of it as an apparent exception to the rule that the rights and liabilities under a contract cannot be assigned at law.²⁰ Such a substitution may be made (1) by express agreement, or (2) by conduct of the parties indicating acquiescence in a change of liability. If, for instance, A. owes B. \$100, and B. owes C. \$100, it may be agreed between all three that A. shall pay C. instead of paying B., so that B. thereby terminates his legal relations with both A. and C.²¹ The consideration for A.'s promise to pay C. is the discharge of B. by C.; the consideration of B.'s discharge of A. is the extinguishment of his debt to C.; and the consideration of C.'s discharge of B. is the promise of A. It would not be enough for A. to say to C., "I will pay you instead of B.," and to afterwards suggest the arrangement to B. and receive his assent;²² nor would it be enough for B. to authorize A. in writing to pay to C., and for A. to acknowledge the paper.²³ All three must enter into the agreement, and the original liability must be extinguished. This is essential, because it is the promise of each that is the consideration for the promise of the others.²⁴

¹⁹ Anson, *Cont.* (4th Ed.) 261; *Ogle v. Earl Vane*, L. R. 2 Q. B. 275, L. R. 3 Q. B. 272.

²⁰ *Ante*, p. 362.

²¹ *Tatlock v. Harris*, 3 Term R. 174; *HEATON v. ANGIER*, 7 N. H. 397, 28 Am. Dec. 353; *Sterling v. Ryan*, 72 Wis. 36, 37 N. W. 572, 7 Am. St. Rep. 818; *McKINNEY v. ALVIS*, 14 Ill. 33; *Litchfield v. Garratt*, 10 Mich. 426; *McClellan v. Robe*, 93 Ind. 298; *Mulgrew v. Cocharen*, 96 Mich. 422, 56 N. W. 70; *Id.*, 98 Mich. 532, 57 N. W. 739; *Atwood v. Town of Mt. Holly*, 65 Vt. 121, 26 Atl. 491; *Byrd v. Bertrand*, 7 Ark. 321; *Foster v. Paine*, 63 Iowa, 85, 18 N. W. 699; *Gardner v. Caylor*, 24 Ind. App. 521, 56 N. E. 134.

²² *Cuxon v. Chadley*, 3 Barn. & C. 591; *BARNES v. INSURANCE CO.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438.

²³ *LIVERSIDGE v. BROADBENT*, 4 Hurl. & N. 603. *Ante*, p. 363.

²⁴ *LIVERSIDGE v. BROADBENT*, 4 Hurl. & N. 603; *Cuxon v. Chadley*, 3 Barn. & C. 591; *Wood v. Moriarty*, 16 R. I. 201, 14 Atl. 855; *First Nat. Bank v. Hall*, 101 U. S. 50, 25 L. Ed. 822; *Hard v. Burton*, 62 Vt. 314, 20 Atl. 269; *SPYCHER v. WERNER*, 74 Wis. 456, 43 N. W. 161, 5 L. R. A. 414; *McKINNEY v. ALVIS*, 14 Ill. 33; *Smith v. Watson*, 82 Va. 712, 1 S. E. 96; *Black v. De Camp*, 73 Iowa, 718, 43 N. W. 625; *Bowen v. Railroad Co.*, 34 S. C. 217, 13 S. E. 421; *Haubert v. Mausshardt*, 89 Cal. 433, 26 Pac. 899; *Morrison v. Kendall*, 6 Ind. App. 212, 33 N. E. 370; *Linneman v. Moross*

As we have said, such a substitution and discharge may arise otherwise than by express agreement; it may arise from the conduct of the parties indicating acquiescence in a change of liability. If a person, for instance, enters into a contract with two others, and the latter agree between themselves that one of them shall retire from the contract and cease to be liable upon it, the first-mentioned party may either insist upon the continued liability of the party remaining, or may treat the contract as broken and discharged by such renunciation of his liabilities by the party so attempting to withdraw. If, however, under some circumstances, the first-mentioned party, after he becomes aware of the retirement of one of the other parties, continues to deal with the remaining party as though no change has taken place, he acquiesces, and may be considered to have entered into a new contract to accept the sole liability of the party so remaining, and cannot hold the other to his original contract. Cases of this sort arise where a member retires from a partnership, after the firm has entered into a contract, and it is subsequently sought to hold him liable thereon. "I apprehend the law to be now settled," said Parke, B., "that if one partner goes out of a firm, and another comes in, the debts of the old firm may, by the consent of all the three parties,—the creditor, the old firm, and the new firm,—be transferred to the new firm."²⁵ Moreover, a retired partner may be discharged by the creditor's adoption of the other partners as his sole debtors, although no new partner has been introduced into the firm.²⁶ An agreement to discharge a retired partner, and look only to a continuing partner, is not inoperative for want of consideration.²⁷ And when the new firm agrees to assume the liabilities of the old, slight circumstances will support an inference of assent on

Estate, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528; *Campbell v. Clay*, 4 Colo. App. 551, 36 Pac. 909; *Butterfield v. Hartshorn*, 7 N. H. 345, 26 Am. Dec. 741; *Cornwell v. Megins*, 39 Minn. 407, 40 N. W. 610; *Levy v. Ford*, 41 La. Ann. 873, 6 South. 671. Cf. *Clough v. Giles*, 64 N. H. 73, 5 Atl. 835; *Wolters v. Thomas* (Cal.) 32 Pac. 565; *Casey v. Miller*, 3 Idaho (Hask.) 567, 32 Pac. 195.

²⁵ *Hart v. Alexander*, 2 Mees. & W. 484. And see *Ludington v. Bell*, 77 N. Y. 138, 33 Am. Rep. 601; *Filipini v. Stead*, 4 Misc. Rep. 405, 23 N. Y. Supp. 1061; Cf. *Ayer v. Kilner*, 148 Mass. 468, 20 N. E. 163. But see *Wadhaus v. Page*, 1 Wash. St. 420, 25 Pac. 462; *Id.*, 6 Wash. 103, 32 Pac. 1068; *Campbell v. Floyd*, 153 Pa. 84, 25 Atl. 1033. Where a creditor of a partnership, after dissolution, accepts the note of some of the partners in payment of the firm debt, intending that it shall satisfy the original obligation, the other partner is discharged. *Waydell v. Luer*, 3 Denio (N. Y.) 410; *Millerd v. Thorn*, 56 N. Y. 402; *Ludington v. Bell*, *supra*; *Powell v. Blow*, 34 Mo. 485; *Stone v. Chamberlin*, 20 Ga. 259; *Maxwell v. Day*, 45 Ind. 509. But not if there is no such intention. *Post*, p. 436, note 82.

²⁶ *York v. Orton*, 65 Wis. 6, 26 N. W. 166.

²⁷ *Thompson v. Percival*, 5 Barn. & Ad. 925; *Backus v. Fobes*, 20 N. Y. 204; *COLLYER v. MOULTON*, 9 R. I. 90, 98 Am. Dec. 370.

the part of a creditor who had notice of the dissolution to a novation.²⁸

In the case of discharge by substituted agreement, the change of rights and liabilities, and consequent extinction of those which before existed, form the consideration on each side for the new contract.²⁹ On principle, it would seem that, if a person should refuse to perform a contract simply because he would suffer a loss by performing, a promise by the other party to pay him more, or to accept less, than originally agreed upon, to induce him to go on with the contract, would be without consideration. We have already seen that on this question the authorities are not in accord.³⁰

SAME—FORM OF DISCHARGE BY NEW AGREEMENT.

231. The general rule is that a contract must be discharged in the same form as that in which it was made. Therefore.

- (a) A contract under seal can only be discharged by agreement, where the agreement is under seal; but by the weight of authority, in this country, at least, the rule does not apply where a parol contract rescinding or modifying a contract under seal has been acted upon, so that it would be inequitable to hold the parties to their original contract.
- (b) A parol contract may be discharged by writing or by word of mouth, whether or not the original contract is in writing, except that—

EXCEPTION—Where the original written contract was within the statute of frauds, though an absolute discharge by rescission may take place by word of mouth, a discharge by substituted agreement must, by the weight of authority, be in writing.

The general rule of the common law being that a contract can only be discharged in the same form as that in which it was made, it follows that an agreement, to operate as a discharge or modification of a previous contract under seal, must also be under seal. The parties to a deed cannot, at common law, discharge their obligation by a parol agreement.³¹ This rule is, however, subject to some qualifications or exceptions.

In the first place, it is possible for them to make a parol contract which creates obligations separate from, and yet substantially at variance with, the deed, so that it in effect contravenes the terms of the

²⁸ *Regester v. Dodge* (C. C.) 6 Fed. 6; *Shaw v. McGregor*, 105 Mass. 96; *Tyson v. Somerville*, 35 Fla. 219. 17 South. 567.

²⁹ Note 11, *supra*.

³⁰ *Ante*, p. 127.

³¹ *SPENCE v. HEALEY*, 8 Ex. 668; *WEST v. BLAKEWAY*, 2 Man. & G. 729; *Allen v. Jaquish*, 21 Wend. (N. Y.) 628; *Thompson v. Brown*, 7 Taunt. 656; *SPENCE v. HEALEY*, 8 Exch. 668; *Cordwert v. Hunt*, 8 Taunt. 596; *Woodruff v. Dobbins*, 7 Black. (Ind.) 582; *Hogencamp v. Ackerman*, 24 N. J. Law, 133; *McMurphy v. Garland*, 47 N. H. 316; *Leavitt v. Stern*, 159 Ill. 526, 42 N. E. 869.

deed, and gives a right of action to which the deed furnishes no answer. In a case illustrative of this point a person had let rooms to another, by contract under seal, for a certain time, at a rent to be ascertained in a certain way, and after his death his administrator entered into a parol agreement with the lessee by which, in consideration of a certain sum to be paid by the lessee, to be taken as a reasonable rent, neither party should be called upon to perform his part under the deed. The lessee failed to make the payment so agreed upon, and the administrator sued him upon the parol contract. The lessee contended that the parol contract was an attempt to vary the deed by an instrument not under seal, and that a performance of this contract, being no discharge of the deed, would leave him liable to his obligation under the deed. The court held, however, that the parol contract created a new obligation; and that a performance of this new contract would furnish an equitable answer to an action on the contract under seal; and that the administrator was entitled to sue on the parol contract.³²

Again, where the obligee does something to prevent performance by the obligor, as where he orally consents to an extension of the time for performance, and the oral waiver is acted upon, when he sues the obligor for nonperformance, he cannot object to parol evidence of his conduct.³³

There is an exception very generally recognized in this country, though not in England, it seems.³⁴ The cases are not very clear as to the limits of this exception, but they seem to establish the rule that where a contract under seal has been rescinded or modified by a subsequent parol agreement, and this agreement has been acted upon by the parties, and they have changed their situation so that it would be inequitable to hold them to the original contract, the parol agreement may be shown; and this rule is recognized at law as well as in equity.³⁵ Though the language of most of the opinions in these cases is as broad

³² *NASH v. ARMSTRONG*, 10 C. B. (N. S.) 259.

³³ *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528; *Nicholas v. Austin*, 82 Va. 817, 1 S. E. 132; *Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170; *Baltimore Fire Ins. Co. v. McGowan*, 16 Md. 47; *Lawrence v. Miller*, 86 N. Y. 131.

³⁴ The rule is recognized in equity. *STEEDS v. STEEDS*, 22 Q. B. Div. 537.

³⁵ *Chesapeake & O. Canal Co. v. Ray*, 101 U. S. 522, 25 L. Ed. 792; *McCREERY v. DAY*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; *Le Fevre v. Le Fevre*, 4 Serg. & R. (Pa.) 241, 8 Am. Dec. 696; *Phelps v. Seely*, 22 Grat. (Va.) 573; *MUNROE v. PERKINS*, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; *Van Syckel v. O'Hearn*, 50 N. J. Eq. 173, 24 Atl. 1024; *White v. Walker*, 31 Ill. 422; *Lawrence v. Dole*, 11 Vt. 549; *Hydeville Co. v. Slate Co.*, 44 Vt. 395; *Green v. Wells*, 2 Cal. 584; *HASTINGS v. LOVEJOY*, 140 Mass. 261, 2 N. E. 776; *Herzog v. Sawyer*, 61 Md. 344; *Dickerson v. Commissioners*, 6 Ind. 128, 63 Am. Dec. 373; *THOMSON v. POOR*, 147 N. Y. 402, 42 N. E. 13. See, also, *Palmer v. Britania Co.*, 188 Ill. 508, 59 N. E. 247.

as the rule stated, it will be found that some of them will fall within one or the other of the qualifications of the rule mentioned above.

A parol or simple contract may be discharged by writing or by word of mouth. It is immaterial that the original contract is in writing, for, as we have seen, the writing is not the agreement, but the evidence of the agreement only.³⁶ There is an exception in cases where the original agreement was required by the statute of frauds to be in writing. In such a case an absolute discharge might probably take place by word of mouth.³⁷ If, however, the discharge is not a simple rescission, but is by substitution of a new contract, either by express provision, or by implication because of inconsistency between it and the original, the better opinion requires a writing. The new contract, resting in parol, would be unenforceable for noncompliance with the statute, and could not discharge the original contract.³⁸ There are some cases in conflict with this statement.³⁹ Parol evidence is admissible, however, to prove substantial performance when the per-

³⁶ *Goss v. Nugent*, 5 Barn. & Adol. 65; *Brown v. Everhard*, 52 Wis. 205. 8 N. W. 725; *Swain v. Seamens*, 9 Wall. 254, 19 L. Ed. 554; *Blagborne v. Hunger*, 101 Mich. 375, 59 N. W. 657; *McNish v. Reynolds*, 95 Pa. 483; *Allen v. Sowerby*, 37 Md. 410; *Wiggin v. Goodwin*, 63 Me. 389; *Aldrich v. Price*, 57 Iowa. 151, 9 N. W. 376, 10 N. W. 339; *Utley v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54; *Teal v. Bilby*, 123 U. S. 572, 8 Sup. Ct. 239, 31 L. Ed. 263; *Flanders v. Fay*, 40 Vt. 316; *Robinson v. Batchelder*, 4 N. H. 40; *Thurston v. Ludwig*, 6 Ohio St. 1, 67 Am. Dec. 328; *Deshazo v. Lewis*, 5 Stew. & P. (Ala.) 91, 24 Am. Dec. 769; *Low v. Forbes*, 18 Ill. 568; *Jones v. Grantham*, 80 Ga. 472, 5 S. E. 764. *Contra*: *Herreshoff v. Misch*, 21 R. I. 524, 45 Atl. 145 (cannot be varied). *Contra*, by statute, in some states, where the oral agreement is unexecuted. *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147; *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181. See, also, ante, pp. 392, 394. Even a provision that no modifications shall be made except in writing, may be changed by parol. *A. J. Anderson Electric Co. v. Lighting Co.* (Tex. Civ. App.) 27 S. W. 504.

³⁷ *Gorman v. Salisbury*, 1 Vern. 240; *Wulschner v. Ward*, 115 Ind. 219, 17 N. E. 273; *Hurley v. Schring*, 62 Hun, 621, 17 N. Y. Supp. 7; *Buel v. Miller*, 4 N. H. 196. As to novation, see ante, p. 68.

³⁸ *NOBLE v. WARD*, L. R. 2 Exch. 135; *Goss v. Lord Nugent*, 5 Barn. & Adol. 58; *Burns v. Real-Estate Co.*, 52 Minn. 31, 53 N. W. 1017; *Hill v. Blake*, 97 N. Y. 216; *HICKMAN v. HAYNES*, L. R. 10 C. P. 598; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *Dana v. Hancock*, 30 Vt. 616; *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165; *Musselman v. Stoner*, 31 Pa. 265; *Wilson's Assignee v. Beam* (Ky.) 14 S. W. 362; *Carpenter v. Galloway*, 73 Ind. 418; *Rueker v. Harrington*, 52 Mo. App. 481; *Augusta Southern R. Co. v. Smith & Kilby Co.*, 106 Ga. 864, 33 S. E. 28.

³⁹ *Stearns v. Hall*, 9 Cush. (Mass.) 31; *CUMMINGS v. ARNOLD*, 3 Mete. (Mass.) 486, 37 Am. Dec. 155; *Negley v. Jeffers*, 28 Ohio St. 90; *Lee v. Hawks*, 68 Miss. 669, 9 South. 828; *McClelland v. Rush*, 150 Pa. 57, 24 Atl. 354. And see *Houston v. Sledge*, 101 N. C. 640, 8 S. E. 145, 2 L. R. A. 487; *Johnston v. Trask*, 116 N. Y. 136, 22 N. E. 377, 5 L. R. A. 630, 15 Am. St. Rep. 394; *Blanchard v. Trim*, 38 N. Y. 225; *Browne*, St. Frauds, § 411; 2 Reed. St. Frauds, § 458.

formance is completed and accepted, and such performance is a defense by way of accord and satisfaction.⁴⁰

SAME—PROVISIONS FOR DISCHARGE CONTAINED IN THE CONTRACT—CONDITIONS SUBSEQUENT.

232. A contract may contain within itself express or implied provisions for its determination under certain circumstances. These provisions are conditions subsequent. Such a discharge may take place by reason of—

- (a) The nonfulfillment of a specified term of the contract.**
- (b) The occurrence of a particular event.**
- (c) The exercise by one of the parties of an option to determine the contract, the option being given either—**
 - (1) By express provision in the contract, or**
 - (2) By a custom or usage forming part of the contract.⁴¹**

Discharge on Nonfulfillment of Term.

In the first of these three cases—that in which the nonfulfillment of a specified term of the contract gives to one of the parties the option of treating the contract as discharged—we seem to be approaching very near to the subject of the discharge of contract by breach, for this, too, may arise from the nonfulfillment of a term which the parties consider to be vital to the contract. There is, however, this difference between a nonfulfillment contemplated by the parties, the occurrence of which shall, it is agreed, make the contract determinable at the option of one, and a breach, or nonfulfillment not contemplated or provided for by the parties. In the former case the parties have, while in the latter they have not, looked beyond the immediate objects of the contract. In the former case the default which is to constitute a discharge is specified by the agreement of the parties, while in the latter it must always be a question of fact or of construction whether or not the default was in a matter vital to the contract, so as to operate as a discharge by breach. An illustration of this mode of discharge is afforded where a chattel is sold with the understanding that it may be returned if it is not satisfactory, or does not answer the description given by the seller. In a leading case on this point, a horse had been sold under a contract by which it was stipulated that, if it did not comply with a certain warranty, the buyer might return it by a specified time. It did not comply with the warranty, and was returned within the time, but the seller refused to accept it, because it had been injured, though

⁴⁰ *Moore v. Campbell*, 10 Exch. 323, per Parke, B.; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; *Long v. Hartwell*, 34 N. J. Law, 116, 127; *Ladd v. King*, 1 R. I. 224, 231, 51 Am. Dec. 624; *Swain v. Seamens*, 9 Wall. 254, 19 L. Ed. 554.

⁴¹ *Anson, Cont.* (4th Ed.) 263-267.

by no fault of the buyer. It was held that the buyer was entitled to return it. "The effect of the contract," it was said, "was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revert in the seller."⁴²

So, where a servant is employed for a specified time to work to the master's satisfaction, the master may have the right to discharge him when he becomes, in good faith, dissatisfied with him.⁴³

Occurrence of Specified Event.

The parties may introduce into the terms of their contract a provision that the fulfillment of a condition, or the occurrence of an event, shall discharge them both from further liabilities under the contract. Such a condition subsequent is well illustrated by the case of a bond, which is a promise subject to, or defeasible upon, a condition expressed in the bond. Another illustration is in case of the excepted risks in a charter party. In a contract of that nature the shipowner agrees with the charterer to make the voyage on the terms expressed in the contract, the act of God, public enemies, fire, collision, and other dangers of the seas, etc., excepted. The occurrence of such an excepted risk releases the shipowner from the strict performance of the contract; and if it should take place while the contract is wholly executory, and frustrate the entire enterprise, the parties are altogether discharged.⁴⁴ Another illustration of such conditions is found in contracts with common carriers. Bills of lading generally contain exceptions by which the liability of the carrier to deliver the goods is to cease if their loss or destruction is caused by certain perils.⁴⁵ A common carrier is said to warrant or insure the safe delivery of goods intrusted to him, but

⁴² *Head v. Tattersall*, L. R. 7 Exch. 7, 14. And see *RAY v. THOMPSON*, 12 Cush. (Mass.) 281, 59 Am. Dec. 187; *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558; *Buswell v. Bicknell*, 17 Me. 344, 35 Am. Dec. 262; *Schlesinger v. Stratton*, 9 R. I. 578; *McKinney v. Bradlee*, 117 Mass. 321; *Robinson v. Fairbanks*, 81 Ala. 132, 1 South. 552. Cf. *Sturm v. Boker*, 150 U. S. 312, 14 Sup. Ct. 99, 33 L. Ed. 1093. It is otherwise where the injury is caused by the fault of the purchaser. *RAY v. THOMPSON*, 12 Cush. (Mass.) 281, 59 Am. Dec. 187. If no time is specified within which the option to rescind must be exercised, a reasonable time is implied. *Quinn v. Stout*, 31 Mo. 160; *Hickman v. Shimp*, 109 Pa. 16; *Washington v. Johnson*, 7 Humph. (Tenn.) 468.

⁴³ *Frary v. Rubber Co.*, 52 Minn. 264, 53 N. W. 1156, 18 L. R. A. 644; *Kochler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Allen v. Compress Co.*, 101 Ala. 574, 14 South. 362; *Magee v. Lumber Co.*, 78 Minn. 11, 80 N. W. 781; *Gwynne v. Hitchner*, 66 N. J. Law. 97, 48 Atl. 571; *Id.*, 67 N. J. Law, 654, 52 Atl. 997; *Kendall v. West*, 196 Ill. 221, 63 N. E. 683, 89 Am. St. Rep. 317. And see *Crawford v. Publishing Co.*, 163 N. Y. 404, 57 N. E. 616. Post, p. 432.

⁴⁴ *Geipel v. Smith*, L. R. 7 Q. B. 404; *Graves v. The Calvin S. Edwards*, 1 C. C. A. 533, 50 Fed. 477.

⁴⁵ *STORER v. GORDON*, 3 Maule & S. 308; *Southern Exp. Co. v. Glenn*, 16 Lea (Tenn.) 472, 1 S. W. 102; *Haas v. Railroad Co.*, 81 Ga. 792, 7 S. E.

his promise, even without express stipulation, is defeasible upon the occurrence of certain excepted risks, such as the act of God⁴⁶ and injuries arising from defects inherent in the thing carried.⁴⁷ This limitation of liability is implied in every contract with a common carrier, and the occurrence of the risks exonerates him from liability for loss incurred through their agency.⁴⁸

Discharge Optional with Notice.

Again, a continuing contract may contain a provision making it determinable at the option of one of the parties, upon certain terms.⁴⁹ Where, for instance, a contract of employment provides that it may be terminated by either party on giving a month's notice, and the servant or agent is dismissed on a month's notice, the contract is discharged and not broken.⁵⁰ Such terms may be incorporated in con-

629; *Slater v. Railroad Co.*, 29 S. C. 96, 6 S. E. 936; *Norris v. Railway Co.*, 23 Fla. 182, 1 South. 475, 11 Am. St. Rep. 355.

⁴⁶ "By the act of God, is meant any accident produced by physical causes which are irresistible; such as lightning, storms, perils of the sea, earthquakes, inundations, sudden death, or illness. The act of God excludes all idea of human agency." *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *McArthur v. Sears*, 21 Wend. (N. Y.) 190. Some courts, however, have used the term as synonymous with "inevitable accident." *Neal v. Saunderson*, 2 Smedes & M. (Miss.) 572, 41 Am. Dec. 609; *Blythe v. Railroad Co.*, 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403; *Crosby v. Fitch*, 12 Conn. 410, 419, 31 Am. Dec. 745; *Walpole v. Bridges*, 5 Blackf. (Ind.) 222. In an English case the court of common pleas held that, to constitute the "act of God," a loss must arise from "such a direct and violent and sudden and irresistible act of nature" as could not be foreseen, or, if foreseen, prevented. *Nugent v. Smith*, 1 C. P. Div. 19. And see *The Niagara v. Cordes*, 21 How. 7, 16 L. Ed. 41. The court of appeal reversed the decision, and held that "it is not necessary to prove that it was absolutely impossible for the carrier to prevent it; but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented." *Nugent v. Smith*, 1 C. P. Div. 441. See, also, *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Nashville & C. R. Co. v. David*, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594; *Palmer v. Railroad Co.*, 101 Cal. 187, 35 Pac. 630; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695.

⁴⁷ *Clarke v. Railroad Co.*, 14 N. Y. 570, 67 Am. Dec. 205; *Penn v. Railroad Co.*, 49 N. Y. 204, 10 Am. Rep. 355; *Cragin v. Railroad Co.*, 51 N. Y. 61, 10 Am. Rep. 559; *Smith v. Railroad Co.*, 12 Allen (Mass.) 531, 90 Am. Dec. 166; *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466; *Evans v. Railroad Co.*, 111 Mass. 142, 15 Am. Rep. 19; *Lindsley v. Railroad Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692.

⁴⁸ *Nugent v. Smith*, 1 C. P. Div. 423.

⁴⁹ *Morrissey v. Broomal*, 37 Neb. 766, 56 N. W. 383; *Bour v. Kimball*, 46 Ill. App. 327.

⁵⁰ *Jenkins v. Long*, 8 Md. 132. And so it is with any other kind of contract which contains an express provision that it may be terminated at any time on giving notice. *Geiger v. Railroad Co.*, 41 Md. 4; *Oregon & W. Mortg. Sav. Bank v. Mortgage Co.* (C. C.) 35 Fed. 22; *Adriance v. Rutheford*, 57 Mich. 170, 23 N. W. 718.

tracts by usage.⁵¹ If a continuous contract fixes no time during which it is to last, and no time is fixed by law or by usage, it may be determined at the will of either party by notice.⁵² A contract of hiring, for instance, if no time is specified, is generally construed as a hiring at will; and the fact that wages are payable at specified periods does not necessarily show that the hiring was for a specified period.⁵³ In every contract of hiring, certain provisions for discharge are implied. If the servant proves incompetent, for instance, or if he acts in such a way as to injure the employer's business, or is otherwise guilty of breach of duty, the latter may rightfully discharge him.⁵⁴ This, however, is a breach of contract by the servant or agent, and the master or principal is discharged by the breach.

DISCHARGE OF CONTRACT BY PERFORMANCE.

233. A contract is discharged by performance—

- (a) Where a promise has been given upon an executed consideration, and is performed by the promisor.
- (b) Where one promise has been given in consideration of another, and both are performed.⁵⁵

Performance of a contract which amounts to an extinction of the obligation must be distinguished from performance which discharges one, only, of the parties from further liabilities under it. Where a promise has been given upon an executed consideration, the promisee has performed his part in the formation of the contract, and performance of his promise by the promisor discharges the contract. All has been done on both sides that could be required to be done under the contract. Where the contract is wholly executory,—that is, where one promise has been given in consideration of another,—performance by one party does not discharge the contract, though it discharges him

⁵¹ *Parker v. Ibbetson*, 4 C. B. (N. S.) 347.

⁵² *Corlin v. Landis*, 46 Pa. 426; *Peacock v. Cummings*, Id. 434; *Greenburg v. Early*, 4 Misc. Rep. 99, 23 N. Y. Supp. 1009; *Attrill v. Patterson*, 58 Md. 226; *Walker v. Denison*, 86 Ill. 142.

⁵³ *Babcock & Wilcox Co. v. Moore*, 62 Md. 161; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176; *Beach v. Mullin*, 34 N. J. Law, 343; *Taterson v. Manufacturing Co.*, 106 Mass. 56; *Franklin Min. Co. v. Harris*, 24 Mich. 115; *Prentiss v. Ledyard*, 28 Wis. 131; *Haney v. Caldwell*, 35 Ark. 156.

⁵⁴ *Keedy v. Long*, 71 Md. 385, 18 Atl. 704; *Adams Exp. Co. v. Trego*, 35 Md. 47; *Leatherberry v. Odell* (C. C.) 7 Fed. 641; *Callo v. Brouneker*, 4 Car. & P. 518; *Beeston v. Caller*, 2 Car. & P. 607; *Newman v. Reagan*, 63 Ga. 755; *Drayton v. Reid*, 5 Daly (N. Y.) 442; *FILLIEUL v. ARMSTRONG*, 7 Adol. & E. 557.

⁵⁵ *Anson*, Cont. (4th Ed.) 270.

from further liability under it. Each must have done his part, in order that performance may be a discharge of the contract.

Whether or not a contract has been performed, so far as the person performing the contract is concerned, must be answered by reference to the operation of contract, while, in so far as the performance is concerned, it must be answered by reference to the construction of contract.

Substantial Performance.

At common law, a strict and literal performance in accordance with the terms of the contract is, as a rule, required.⁵⁶ In equity, on the other hand, contracts not capable of literal performance will be decreed with compensation for deficiencies where there is a variance, provided the contract can be performed in substance.⁵⁷ Even at law the rule generally prevails that where one of the parties has endeavored in good faith to perform and has substantially performed his contract, and thereby conferred on the other party a substantial benefit, although he has failed to perform in some particulars, he may recover the contract price, less the amount of the damages sustained by the other party by reason of the failure of strict performance.⁵⁸ To justify a recovery on the contract so substantially performed, the omissions or deviations must not be willful; and "they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for."⁵⁹ This rule has its most frequent application in building contracts, where the con-

⁵⁶ *Dauchey v. Drake*, 85 N. Y. 407; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Harris v. Sharples*, 202 Pa. 243, 51 Atl. 965, 58 L. R. A. 214. But there may be performance, within the fair intent and meaning of the contract, if the departure from the letter of the contract is trifling. *Drew v. Goodhue*, 74 Vt. 436, 52 Atl. 971.

⁵⁷ *Easton*, Eq. 558.

⁵⁸ *HAYWARD v. LEONARD*, 7 Pick. (Mass.) 181, 19 Am. Dec. 269; *NOLAN v. WHITNEY*, 88 N. Y. 648; *Blood v. Wilson*, 141 Mass. 25, 6 N. E. 362; *Pinches v. Lutheran Church*, 55 Conn. 183, 10 Atl. 264; *Todd v. Huntington*, 13 Or. 9, 4 Pac. 295; *Katz v. Bedford*, 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; *Leeds v. Little*, 42 Minn. 414, 44 N. W. 309; *Gallagher v. Sharpless*, 134 Pa. 134, 19 Atl. 491; *Keeler v. Herr*, 157 Ill. 57, 41 N. E. 750; *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573; *Desmond-Dunne Co. v. Friedman-Doscher Co.*, 162 N. Y. 486, 56 N. E. 995; *Spence v. Ham*, 163 N. Y. 220, 57 N. E. 412, 51 L. R. A. 238; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247; *Philip Hiss Co. v. Pitcairn (C. C.)* 107 Fed. 425; *Jones & Hotchkiss Co. v. Davenport*, 74 Conn. 418, 50 Atl. 1028. Cf. *Ætna Iron & Steel Works v. Kossuth County*, 79 Iowa, 40, 44 N. W. 215.

⁵⁹ *Elliott v. Caldwell*, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52. See, also, *Gillespie Tool Co. v. Wilson*, 123 Pa. 19, 16 Atl. 36; *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017; *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840; *Anderson v. Todd*, 8 N. D. 158, 77 N. W. 599; *Cornish, Curtis & Greene Co. v. Association*, 82 Minn. 215, 84 N. W. 724; *Harris v. Sharples*, 202 Pa.

tractor's labor and materials have added value to the owner's land, which the owner must necessarily retain and have the benefit of. It seems that in such cases, where there is a material breach, the liability is quasi contractual, the plaintiff being allowed to recover because of the unjust enrichment of the other party, and consequently that the amount of recovery should be, not necessarily the contract price less the damages resulting from failure of strict performance, but, as has recently been held in Massachusetts, the additional value to the land of the defendant by reason of the plaintiff's labor and materials, and that the burden is on the plaintiff to show a benefit, and its amount.⁶⁰ In many cases, however, this value can be ascertained by deducting from the contract price the cost of completing the building or article according to the specifications.⁶¹

Performance to Satisfaction of Promisor.

Where it is a term of the contract that the performance shall be satisfactory to the other party, it is a question of interpretation whether his obligation is conditional upon actual satisfaction or reasonable satisfaction. In contracts in which the subject-matter involves the personal taste or judgment of the promisor,⁶² for example, a suit of clothes,⁶³ a picture,⁶⁴ a play, or other literary production,⁶⁵ the courts construe the contract as making the promisor the sole judge; and although the compensation of the promisee may thus be dependent on the promisor, who unreasonably withholds his satisfaction, the promisee cannot be relieved from the contract into which he has voluntarily entered. The tendency of the courts is perhaps to construe all contracts providing for the satisfaction of the promisor in the same manner.⁶⁶ The promisor must, however, act in good faith.⁶⁷ On the

243, 51 Atl. 965, 58 L. R. A. 214. But see *Danforth v. Freeman*, 69 N. H. 466, 43 Atl. 621.

⁶⁰ *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455.

⁶¹ See *Kelly v. Town of Bradford*, 33 Vt. 35; *Pinches v. Lutheran Church*, 55 Conn. 185, 10 Atl. 264; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650.

⁶² *Andrews v. Belfield*, 2 C. B. (N. S.) 779; *McGarren v. McNulty*, 7 Gray (Mass.) 139; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; *HAWKINS v. GRAHAM*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Housding v. Solomon*, 127 Mich. 654, 87 N. W. 57.

⁶³ *BROWN v. FOSTER*, 113 Mass. 136, 18 Am. Rep. 463.

⁶⁴ *Gilson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446; *Pennington v. Howland*, 21 R. I. 65, 41 Atl. 891, 79 Am. St. Rep. 774.

⁶⁵ *Haven v. Russell* (Sup.) 34 N. Y. Supp. 292; *Walker v. Edward Thompson Co.*, 37 App. Div. 536, 56 N. Y. Supp. 326.

⁶⁶ *Seeley v. Welles*, 120 Pa. 69, 13 Atl. 736; *ADAMS RADIATOR & BOILER WORKS v. SCHNADER*, 155 Pa. 394, 26 Atl. 745, 35 Am. St. Rep.

⁶⁷ *Silsby Mfg. Co. v. Town of Chico* (C. C.) 24 Fed. 893; *SINGERLY v. THAYER*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; *Electric Lighting Co. of Mobile v. Elder*, 115 Ala. 138, 21 South. 983.

other hand, the parties may agree that the satisfactoriness may be determined by the mind of a reasonable man, and not by the mere taste or liking of the promisor;⁶⁸ and where the subject-matter of the contract involves such considerations as salability, operative fitness, and mechanical utility, rather than personal feeling or taste, many courts construe the satisfaction contemplated as that of a reasonable man.⁶⁹ And some cases even lay down the broad rule that where a contract is to be performed to the satisfaction of one of the parties, the meaning necessarily is that it must be done to the satisfaction of the mind of a reasonable man.⁷⁰ It seems, however, that the question in each case should be the determination of the intention of the parties as evinced by the particular contract, and that no invariable rules of interpretation can be laid down.⁷¹

Time of Performance.

Where no time for performance is fixed by the contract, a reasonable time is implied.⁷² Where a time is specified, the question arises whether it is of the essence of the contract or not. This question must be answered by the rules of construction which we have already considered.⁷³ If time is of the essence, a performance after the time fixed does not bind the other party unless he waives the breach, and thereby, in effect, makes a new contract taking the place of the old one. Where a particular day is fixed upon for performance, or per-

893; *Silsby Mfg. Co. v. Town of Chico* (C. C.) 24 Fed. 893; *Campbell Printing-Press Co. v. Thorp* (C. C.) 36 Fed. 414, 1 L. R. A. 645; *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; *McCormick Harvesting Mach. Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846; *Exhaust Ventilator Co. v. Railroad Co.*, 66 Wis. 218, 28 N. W. 343, 57 Am. Rep. 257; *Blaine v. Publishers George Knapp & Co.*, 140 Mo. 241, 41 S. W. 787; *Williams Mfg. Co. v. Brass Co.*, 173 Mass. 356, 53 N. E. 862.

⁶⁸ *HAWKINS v. GRAHAM*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422.

⁶⁹ *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 908, 45 Am. Rep. 57; *Schliess v. City of Grand Rapids* (Mich.) 90 N. W. 700. And see *DUPLEX SAFETY BOILER CO. v. GARDEN*, 101 N. Y. 387, 4 N. E. 749, 54 Am. Rep. 709.

⁷⁰ *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Richison v. Mead*, 11 S. D. 639, 80 N. W. 131. And see *DOLL v. NOBLE*, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398.

⁷¹ *Wood Reaping & Mowing Mach. Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57; *HAWKINS v. GRAHAM*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Magee v. Lumber Co.*, 78 Minn. 11, 80 N. W. 781; *Electric Lighting Co. of Mobile v. Elder*, 115 Ala. 138, 21 South. 983; *McNeil v. Armstrong*, 81 Fed. 943, 27 C. C. A. 16; *City of Elizabeth v. Fitzgerald*, 114 Fed. 547, 52 C. C. A. 321.

⁷² Ante, p. 408. Where the act to be done is the payment of money, the presumption is that it is to be paid on demand. *Warren v. Wheeler*, 8 Mete (Mass.) 97.

⁷³ Ante, p. 408.

formance is required within a certain time, the contract may be performed at any time during the day or during the last day.⁷⁴

Effect of Failure of Performance.

If there is a failure of performance, partial or total, then the contract is broken. Whether the breach amounts to a discharge is a question which we shall hereafter discuss.

SAME—PAYMENT.

234. Payment consists in the performance of a contract—

- (a) **By the delivery of money, or**
- (b) **By the delivery of negotiable instruments conferring the right to receive money, in which latter case the payee may take the instrument—**
 - (1) **In discharge of his right absolutely, or**
 - (2) **Subject to a condition (which, in most jurisdictions, will be presumed, in the absence of expressions to the contrary) that, if not paid when due, the payee reverts to his original rights, either to performance of the contract or satisfaction for its breach.⁷⁵**

If the liability of a party to a contract consists in the payment of a sum of money in a certain way or at a certain time, such a payment discharges him by the performance of his agreement. If, again, a person who is liable to perform certain acts under his contract wishes instead to pay a sum of money, or, having to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with the other party to accept the proposed payment in lieu of such performance as he is entitled to under the contract.⁷⁶ In such a case the payment is a performance of the substituted agreement, and a discharge of the contract. Again, where one of two parties has made default in the performance of his part of the contract, so that a right of action has accrued to the other, the obligation formed by this right of action may be discharged by an accord and satisfaction; that is, an agreement, the consideration for which is usually a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other.⁷⁷ Payment, then, is the performance of a contract, whether it be a performance of an original or of a substituted contract, or of a contract in which payment is the consideration for a forbearance to exercise a right of action which may have arisen from the breach of an agreement.

If counterfeit coins, bank notes, or other moneys are given in performance of a promise to pay money, even though they are believed

⁷⁴ Leake, *Cont.* 441; *Startup v. Macdonald*, 6 *Man. & G.* 593.

⁷⁵ Anson, *Cont.* (4th Ed.) 272-274.

⁷⁶ *Ante*, p. 420.

⁷⁷ *Post*, p. 491.

to be good, there is no payment. The promisee may treat it as a nullity.⁷⁸ Where, for the purpose of making a payment, money is sent by the debtor to the creditor by mail, and is lost before it reaches him, it will discharge the debt, and the loss will fall on the creditor, if the remittance was in the manner authorized by him, but not otherwise.⁷⁹

Payment by Negotiable or Nonnegotiable Instrument.

A negotiable instrument may be given for a sum due, either liquidated or unliquidated. It is in effect a substitution of a new agreement for the old one, but it does not necessarily discharge the old agreement. Where such a payment is made, either in performance of an existing contract or in satisfaction of a broken contract, it may discharge the party making it, either absolutely or conditionally. Whether it has the one or the other of these effects depends upon the intention of the parties.⁸⁰ If the instrument is accepted by the party entitled to payment, and in consideration thereof he promises, either expressly or impliedly, to discharge the other party altogether from his existing liabilities, the discharge of the original contract is absolute. The payee relies then upon the rights conferred by the instrument, and, if it is not paid, he must sue on it. He cannot sue on the original contract.⁸¹ On the oth-

⁷⁸ *Markle v. Hatfield*, 2 Johns. (N. Y.) 455, 3 Am. Dec. 446; *Young v. Adams*, 6 Mass. 182; *Gilman v. Peck*, 11 Vt. 516, 34 Am. Dec. 702; *Blalock v. Phillips*, 38 Ga. 216; *U. S. v. Morgan*, 11 How. 154, 13 L. Ed. 643; *First Nat. Bank v. Buchanan*, 87 Tenn. 32, 9 S. W. 202, 1 L. R. A. 199, 10 Am. St. Rep. 617. He may be estopped, however, if he was guilty of negligence in receiving the counterfeit, or if, after discovery, he delays for an unreasonable time to return it or notify the debtor. *Thomas v. Todd*, 6 Hill (N. Y.) 340; *Pindall's Ex'rs v. Bank*, 7 Leigh (Va.) 617; *Rick v. Kelly*, 30 Pa. 527; *Wingate v. Neidlinger*, 50 Ind. 520; *Union Nat. Bank v. Baldenwick*, 45 Ill. 375; *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219.

⁷⁹ *Palmer v. Insurance Co.*, 84 N. Y. 63; *Gurney v. Howe*, 9 Gray (Mass.) 404, 69 Am. Dec. 299; *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Kenyon v. Association*, 122 N. Y. 247, 25 N. E. 299; *Burr v. Sickles*, 17 Ark. 428, 65 Am. Dec. 437; *Williams v. Carpenter*, 36 Ala. 9, 76 Am. Dec. 316; *Gross v. Criss*, 3 Grat. (Va.) 262.

⁸⁰ *Cheltenham Stone & Gravel Co. v. Iron Works*, 124 Ill. 623, 16 N. E. 923; *Flanagan v. Hambleton*, 54 Md. 222; *Combination Steel & Iron Co. v. Railway Co.*, 47 Minn. 207, 49 N. W. 744; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785; *National Park Bank v. Levy*, 17 R. I. 746, 24 Atl. 777, 19 L. R. A. 475; *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 11 Sup. Ct. 360, 34 L. Ed. 1019; *Craddock v. Dwight*, 85 Mich. 587, 48 N. W. 644; *Bank of Monroe v. Gifford*, 79 Iowa, 300, 44 N. W. 558; note 82, *infra*.

⁸¹ *Sard v. Rhodes*, 1 Mees. & W. 153; *Wolf v. Fink*, 1 Pa. 435, 44 Am. Dec. 141; *Ralston v. Wood*, 15 Ill. 159, 58 Am. Dec. 604; *Bausman v. Guarantee Co.*, 47 Minn. 377, 50 N. W. 496; *Kirkpatrick v. Puryear*, 93 Tenn. 409, 24 S. W. 1130, 22 L. R. A. 785; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 7 Atl. 802, 59 Am. Rep. 186; *Costar v. Davies*, 8 Ark. 213, 46 Am. Dec. 311.

er hand, the instrument may be taken as a conditional discharge only; and in England and in most of our states it is presumed to have been so taken unless there is something to show a contrary intention.⁸² In such a case the position of the parties is that the payee, having certain rights against the other party under a contract, has agreed to take the instrument from him instead of immediate payment of what is due him, or immediate enforcement of his right of action, and the other party, in giving the instrument, has thus far satisfied the payee's claim; but, if the instrument is not paid at maturity, the consideration for the payee's promise fails, and his original rights are restored to him. The effect of receiving a negotiable instrument conditionally is merely to suspend the right to sue on the original contract until the instrument matures, and when it matures, and is not paid, to give the right to sue either on it or on the original contract.⁸³ The agreement is defensible upon condition subsequent; that is, upon nonpayment of the instrument when due.

Payment, then, consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed, in the absence of expressions to the contrary) that, if payment be not made

⁸² *Sayer v. Wagstaff*, 5 Beav. 423; *Robinson v. Read*, 9 Barn. & C. 449; *Feldman v. Beier*, 78 N. Y. 293; *The Kimball*, 3 Wall. 37, 18 L. Ed. 50; *Bill v. Porter*, 9 Conn. 23; *Stewart Paper Mfg. Co. v. Rau*, 92 Ga. 511, 17 S. E. 748; *Morriss v. Harveys*, 75 Va. 726; *Sayre v. King*, 17 W. Va. 562; *Shepherd v. Busch*, 154 Pa. 149, 26 Atl. 363, 35 Am. St. Rep. 815; *Sebastian May Co. v. Codd*, 77 Md. 293, 26 Atl. 316; *Akin v. Peters*, 45 Ark. 313; *Belleville Sav. Bank v. Bornman*, 124 Ill. 200, 16 N. E. 210; *Case v. Seass*, 44 Mich. 195, 6 N. W. 227; *First Nat. Bank v. Case*, 63 Wis. 504, 22 N. W. 833. But the presumption is reversed where the note of a third person is given without guaranty or indorsement, on account of a contemporaneous debt. *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409, 6 Am. Dec. 383; *Noel v. Murray*, 13 N. Y. 167; *Deford v. Dryden*, 46 Md. 248; *Bicknell v. Waterman*, 5 R. I. 43. And see *FORD v. MITCHELL*, 15 Wis. 304. But see *Devlin v. Chamblin*, 6 Minn. 468 (Gil. 325); *McIntyre v. Kennedy*, 29 Pa. 448. In Massachusetts and several other states the presumption is that the instrument was intended to be accepted as an absolute discharge. *Dodge v. Emerson*, 131 Mass. 467; *Mehan v. Thompson*, 71 Me. 492; *Mason v. Douglas*, 6 Ind. App. 558, 33 N. E. 1009; *Smith v. Bettger*, 68 Ind. 254, 34 Am. Rep. 256; *Teal v. Spangler*, 72 Ind. 380; *Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131; *Hadley v. Bordo*, 62 Vt. 285, 19 Atl. 476. These various presumptions may be rebutted by evidence of a different intention. *Norton, Bills & N.* (3d Ed.) 19.

⁸³ *Sayer v. Wagstaff*, 5 Beav. 423; *Happy v. Mosher*, 48 N. Y. 313; *Hall v. Richardson*, 16 Md. 396, 77 Am. Dec. 303; *Lupton v. Freeman*, 82 Mich. 638, 46 N. W. 1012; *Morrison v. Smith*, 81 Ill. 221; *Fry v. Patterson*, 49 N. J. Law, 6, 12, 10 Atl. 390; *Hays v. McClurg*, 4 Watts (Pa.) 452; *Barnet v. Smith*, 30 N. H. 256, 61 Am. Dec. 290. See, also, the cases cited in note 82, supra.

when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract, or rights to satisfaction for the breach of one.⁸⁴

Application of Payments.

Where a person owes several debts to another, or owes on an account consisting of several different items, and makes a part payment, the question arises as to which debt is discharged. As a rule, the debtor has a right to say which debt he will pay, and he may show his intention in this respect by his conduct, or it may otherwise be inferred from the circumstances.⁸⁵ If the creditor receives the payment, he is bound to apply it as expressly or impliedly directed.⁸⁶

If the debtor does not direct the application, at the time of the payment,⁸⁷ the creditor, as a rule, may apply it as he may see fit.⁸⁸ He may apply it, for instance, to a debt which is barred by the statute of limita-

⁸⁴ Robinson v. Read, 9 Barn. & C. 449; Sayer v. Wagstaff, 5 Beav. 415.

⁸⁵ Stone v. Seymour, 15 Wend. (N. Y.) 19; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. Ed. 384; Fowke v. Bowie, 4 Har. & J. (Md.) 566; Hansen v. Rounsavell, 74 Ill. 238; Stewart v. Keith, 12 Pa. 238; Sawyer v. Tappan, 14 N. H. 352.

⁸⁶ Patty v. Milne, 16 Wend. (N. Y.) 557; Miln v. Patty, 22 Wend. (N. Y.) 558; Ellis v. Mason, 32 S. C. 277, 10 S. E. 1069; Washington Natural Gas Co. v. Johnson, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Atkinson v. Cox, 54 Ark. 444, 16 S. W. 124; Stewart v. Hopkins, 30 Ohio St. 502; Wetherell v. Jay, 40 Me. 325; Champenois v. Fort, 45 Miss. 355; Runyan v. Latham, 27 N. C. 551. Cf. Flarsheim v. Brestup, 43 Minn. 298, 45 N. W. 438.

⁸⁷ Pearce v. Walker, 103 Ala. 250, 15 South. 568.

⁸⁸ Mayor, etc., of Alexandria v. Patten, 4 Cranch, 317, 2 L. Ed. 633; Harding v. Tift, 75 N. Y. 461; First Nat. Bank v. Johnson, 65 Vt. 382, 26 Atl. 634; Whitaker v. Groover, 54 Ga. 174; Jones v. Williams, 39 Wis. 300; Case v. Fant, 3 C. C. A. 418, 53 Fed. 41; Henry Bill Pub. Co. v. Utley, 155 Mass. 366, 29 N. E. 635; Lee v. Early, 44 Md. 80; Senter v. Williams (Ark.) 17 S. W. 1029; Beck v. Haas, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516; Howard v. McCall, 21 Grat. (Va.) 205; Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Jefferson v. Church of St. Matthew, 41 Minn. 392, 43 N. W. 74; Byrnes v. Claffey, 69 Cal. 120, 10 Pac. 321; Koch v. Roth, 150 Ill. 212, 37 N. E. 317. The creditor cannot, without the debtor's consent, apply the payment to an illegal claim. Phillips v. Moses, 65 Me. 70; Pickett v. Bank, 32 Ark. 346; McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781; Caldwell v. Wentworth, 14 N. H. 431; Bancroft v. Dumas, 21 Vt. 456; Rohan v. Hanson, 11 Cush. (Mass.) 44; Kidder v. Norris, 18 N. H. 532; unless the debtor consents, Brown v. Burns, 67 Me. 535; Feldman v. Gamble, 26 N. J. Eq. 494. But he may apply it to a debt which is merely unenforceable, and not illegal. Haynes v. Nice, 100 Mass. 327, 1 Am. Rep. 109; Ayer v. Hawkins, 19 Vt. 26; Murphy v. Webber, 61 Me. 478. He cannot apply it to a debt not yet due. Heard v. Pulaski, 80 Ala. 502, 2 South. 343; Bobe's Heirs v. Stickey, 36 Ala. 482. The application must be made within a reasonable time, or it will be applied by law. Harker v. Conrad, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691.

tions, in preference to another which is not barred.⁸⁹ Having once made the application, he cannot change it without the debtor's consent.⁹⁰

If neither party makes an appropriation of the payment, the law will apply it. According to the civil law, the presumable intention of the debtor was resorted to as the rule to determine the application, and, in the absence of express declaration by either party, the payment was applied in the way that would be most beneficial to the debtor. "The payment was consequently applied to the most burdensome debt, —to one that carried interest, rather than to that which carried none; to one secured by a penalty, rather than to that which rested on a simple stipulation; and, if the debts were equal, then to that which had been first contracted."⁹¹ This rule has been adopted in a number of cases both in England and in this country. In a well-considered New York case the rule was approved after a full review of the authorities, and a payment was applied to a mortgage and a judgment debt in preference to an account, because the former would bear most heavily on the debtor.⁹² Many of the courts, on the other hand, have adopted a rule to some extent directly opposed to the civil-law rule. "If the application is made by neither party," it has been said by the supreme court of the United States, "it becomes the duty of the court, and in its exercise a sound discretion is to be exercised. It cannot be conceded that this application is to be made in a manner most advantageous to the debtor. * * * It would seem reasonable that an equitable application should be made; and, it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious." In this case the payment was applied to other demands rather than to a judgment debt, on the ground that the former were not so well secured.⁹³ Probably

⁸⁹ *Jackson v. Burke*, 1 Dill. 311. Fed. Cas. No. 7,133; *Ayer v. Hawkins*, 19 Vt. 26; *Williams v. Griffith*, 5 Mees. & W. 300; *Waugh v. Cope*, 6 Mees. & W. 824; *Murphy v. Webber*, 61 Me. 478; *Pond v. Williams*, 1 Gray (Mass.) 630; *Ramsay v. Warner*, 97 Mass. 8; *Beck v. Haas*, 31 Mo. App. 180. But see *Id.*, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516.

⁹⁰ *Offutt v. King*, 1 McArthur (D. C.) 312; *Pearce v. Walker*, 103 Ala. 250, 15 South. 568; *Cremer v. Higginson*, 1 Mason, 337, Fed. Cas. No. 3,383; *McMaster v. Merrick*, 41 Mich. 505, 2 N. W. 895. Nor can the creditor be compelled to change the application. *Jefferson v. Church of St. Matthew*, 41 Minn. 392, 43 N. W. 74; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80.

⁹¹ *Devaynes v. Noble* (Clayton's Case), 1 Mer. 572, 606.

⁹² *Pattison v. Hull*, 9 Cow. 747; *Bacon v. Brown*, 1 Bibb (Ky.) 334, 4 Am. Dec. 623; *Jones v. Benedict*, 83 N. Y. 79; *Heyward v. Lomax*, 1 Vern. 24; *Prowse v. Worthinge*, 2 Brown & G. 107; *Neal v. Allison*, 50 Miss. 175; *Gwinn v. Whitaker's Adm'x*, 1 Har. & J. (Md.) 754; *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402; *Perot v. Cooper*, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; *Robinson v. Doolittle*, 12 Vt. 246; *Moore v. Kiff*, 78 Pa. 96.

⁹³ *Field v. Holland*, 6 Cranch, 27, 3 L. Ed. 136. And see *Burks v. Albert*,

most of the courts in this country follow the rule just stated, though with some qualification. It is very generally said that an equitable application will be made; that is, that the payment will be applied according to the justice of the particular case, in view of all the circumstances.⁹⁴ Such a rule is not very definite. Is it more equitable to give effect to the civil-law rule, and apply the payment as would be most beneficial to the debtor, or to follow the opposite rule, and consider the creditor's interests? The Minnesota court, in stating the rule, has thus qualified it: "It is true that, where the parties have not made any specific application of payments, courts will make it according to the justice and equity of the case; but in doing so they are governed by certain general and established rules, and are not at liberty to adopt their own notions of what may be just and equitable in each particular case."⁹⁵ One of these rules is that, where there is but one continuous account of several items, "the payments will be applied on the account according to the priority of time,—that is, the first item on the debit side is discharged or reduced by the first item on the credit side;" and so, where there are several debts of equal dignity, a payment will generally be applied to the oldest.⁹⁶ As we have seen, when we get beyond this, there is a conflict of opinion.⁹⁷

4 J. J. Marsh. (Ky.) 97, 20 Am. Dec. 209; *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746; *Leeds v. Gifford*, 41 N. J. Eq. 464, 5 Atl. 795; *The D. B. Steelman* (D. C.) 48 Fed. 580; *Stamford Bank v. Benedict*, 15 Conn. 437; *Hilton v. Burley*, 2 N. H. 193. In a later case, under the same rule (the rule of equitable application), the payments were so applied as to operate beneficially to the sureties of the debtor, and against the creditor. *United States v. Kirkpatrick*, 9 Wheat. 737, 6 L. Ed. 199.

⁹⁴ *Smith v. Loyd*, 11 Leigh (Va.) 512, 37 Am. Dec. 621; *Stone v. Seymour*, 15 Wend. (N. Y.) 19; *White v. Trumbull*, 15 N. J. Law, 314, 29 Am. Dec. 687; *Allen v. Culver*, 3 Denio (N. Y.) 284; *Pierce v. Knight*, 31 Vt. 701; *Crompton v. Pratt*, 105 Mass. 255.

⁹⁵ *Hersey v. Bennett*, 28 Minn. 86, 9 N. W. 590, 41 Am. Rep. 271. And see *Miller v. Miller*, 23 Me. 22, 39 Am. Dec. 597; *Bobbe's Heirs v. Stickney*, 36 Ala. 482.

⁹⁶ *Devaynes v. Noble* (Clayton's Case), 1 Mer. 572; *Hersey v. Bennett*, 28 Minn. 86, 9 N. W. 590, 41 Am. Rep. 271; *Miller v. Miller*, 23 Me. 22, 39 Am. Dec. 597; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Pierce v. Knight*, 31 Vt. 701; *Crompton v. Pratt*, 105 Mass. 255; *Smith v. Loyd*, 11 Leigh (Va.) 512, 37 Am. Dec. 621; *Hill v. Robbins*, 22 Mich. 474; *Winnebago Mills v. Travis* (Minn.) 58 N. W. 36; *Cushing v. Wyman*, 44 Me. 121; *Fairchild v. Holly*, 10 Conn. 175; *Truscott v. King*, 6 N. Y. 147; *Jones v. United States*, 7 How. 681, 12 L. Ed. 870; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199; *Emery v. Tichout*, 13 Vt. 15; *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427; *Stiernberger v. Gowdy*, 93 Ky. 146, 19 S. W. 186; *Sprague v. Hazenwinkle*, 53 Ill. 419.

⁹⁷ Payment will be applied in extinguishment of a certain, rather than a contingent, liability, *President, etc., of Niagara Bank v. Roosevelt*, 9 Cow. (N. Y.) 409; *President, etc., of Bank of Portland v. Brown*, 22 Me. 295; and to extinguish an existing debt, rather than a debt not yet due, *Baker v.*

SAME—TENDER.

235. Tender is an offer or attempt to perform, and may be either—

- (a) An offer to do something promised, in which case the offer, and its refusal by the promisee, discharge the promisor from the contract.**
- (b) An offer to pay something promised, in which case the offer, and its refusal by the promisee, do not discharge the debt, but prevent the promisee from recovering more than the amount tendered, and in an action by the promisee entitle the promisor to recover the costs of his defense.⁹⁸**

"Tender" is an attempted performance. The word is applied to performance of two kinds: (1) To performance of a promise to do something; and (2) to performance of a promise to pay something,—and the effect of the attempt at performance in the two cases is different. In both cases the performance is frustrated by the act of the party for whom it is to take place.

Where, in a contract for the sale of goods, the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.⁹⁹ Where, however, the performance due consists in the payment of a sum of money, a tender by the debtor, although it may constitute a good defense to an action by the creditor, does not discharge the debt.¹⁰⁰ If the creditor will not take the money when it is due and is tendered him, he puts himself at a disadvantage if he should attempt to recover it by action, but the debt is not discharged. The debtor, to defend successfully by pleading the tender, must continue always ready and willing to pay the debt, or, as it is said, the tender must be kept good; and when he is sued, and pleads the tender, he must, in most jurisdictions, pay the money into court.¹⁰¹ If the plea is sustained, the creditor gets nothing but what was originally tendered him, and the debtor gets

Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; Kline v. Ragland, 47 Ark. 111, 14 S. W. 474; Heard v. Pulaski, 80 Ala. 502, 2 South. 343; Bobe's Heirs v. Stickney, 36 Ala. 482.

⁹⁸ Anson, Cont. (4th Ed.) 274, 275.

⁹⁹ Startup v. Macdonald, 6 Man. & G. 593; Benj. Sales, 563; Lamb v. Lathrop, 13 Wend. (N. Y.) 95, 27 Am. Dec. 174; Phelps v. Hubbard, 51 Vt. 489; Oelrichs v. Artz, 21 Md. 524; Berry v. Nall, 54 Ala. 446; Mitchell v. Merrill, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128.

¹⁰⁰ Dixon v. Clarke, 5 C. B. 376.

¹⁰¹ Dixon v. Clarke, 5 C. B. 376; Aulger v. Clay, 109 Ill. 487; Illinois v. Railroad Co. (C. C.) 33 Fed. 730; Rice v. Kahn, 70 Wis. 323, 35 N. W. 465; Becker v. Boon, 61 N. Y. 317; Taylor v. Railroad Co., 119 N. Y. 561, 23 N. E. 1106; Columbian Bldg. Ass'n of East Baltimore No. 4 v. Crump, 42 Md. 192;

judgment for his costs, so that he is placed, as nearly as can be, in as good a position as he held at the time of the tender.¹⁰²

Tender, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place, and mode of payment.¹⁰³ Further than this, the tender must be an offer of money produced, or at least made accessible to the creditor, and not of a check, for instance. The debtor must have it with him; but its actual production may be waived by the creditor, not only expressly, but impliedly, as where, before it is produced, he declares that he will not receive it.¹⁰⁴ It need not necessarily be of the exact sum, but it must be of such a sum that the creditor can take exactly what is due without being called upon to give change.¹⁰⁵ The tender must be made by the person whose duty it is to pay, or by his agent, and not by a mere stranger or intermeddler;¹⁰⁶ and it must be made to the party entitled to receive payment, or to his duly-authorized agent;¹⁰⁷

Bissell v. Heyward, 96 U. S. 580, 24 L. Ed. 678; *Roberts v. White*, 146 Mass. 256, 15 N. E. 568; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 South. 262.

¹⁰² *Cornell v. Green*, 10 Serg. & R. (Pa.) 14.

¹⁰³ *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158; *Abshire v. Corey*, 113 Ind. 484, 15 N. E. 685; *People's Sav. Bank v. Borough of Norwalk*, 56 Conn. 547, 16 Atl. 257; *Tillou v. Britton*, 9 N. J. Law, 120; *Hubbard v. Bank*, 8 Cow. (N. Y.) 88.

¹⁰⁴ *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Hall v. Insurance Co.*, 57 Conn. 105, 17 Atl. 356; *Parker v. Pettit*, 43 N. J. Law, 512; *Collier v. White*, 67 Miss. 133, 6 South. 618; *Mathis v. Thomas*, 101 Ind. 119; *KNIGHT v. ABBOTT*, 30 Vt. 577; *Pinney v. Jorgenson*, 27 Minn. 26, 6 N. W. 376; *Larsen v. Breene*, 12 Colo. 480, 21 Pac. 498; *Guthman v. Keam*, 8 Neb. 502, 1 N. W. 129; *Behaly v. Hatch*, 1 Miss. 369, 12 Am. Rep. 570; *Oakland Bank of Savings v. Applegarth*, 67 Cal. 86, 7 Pac. 139, 476; *Dungan v. Insurance Co.*, 46 Md. 469. Tender by check may be sufficient where no objection is made on this ground. *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415. And see *Walsh v. Association*, 101 Mo. 534, 14 S. W. 722; *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118.

¹⁰⁵ *Betterbee v. Davis*, 3 Camp. 70; *Robinson v. Cook*, 6 Taunt. 336; *Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; *Weld v. Bank*, 158 Mass. 339, 33 N. E. 519; *Brandt v. Railroad Co.*, 26 Iowa, 114; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564; *Patterson v. Cox*, 25 Ind. 261.

¹⁰⁶ *Sinclair v. Learned*, 51 Mich. 335, 16 N. W. 672; *Kincaid v. School Dist.*, 11 Me. 188; *Brown v. Dysinger*, 1 Rawle (Pa.) 408; *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571; *McDougald v. Dougherty*, 11 Ga. 570; *Johnson v. Smock*, 1 N. J. Law, 106.

¹⁰⁷ *Carman v. Pultz*, 21 N. Y. 547; *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688; *Oatman v. Walker*, 33 Me. 67; *King v. Finch*, 60 Ind. 420; *McIniffe v. Wheelock*, 1 Gray (Mass.) 600; *Conrad v. Trustees of Grand Grove*, 64 Wis. 258, 25 N. W. 24; *Billiot v. Robinson*, 13 La. Ann. 529; *Hoyt v. Byrnes*, 11 Me. 475; *Cropp v. Hambleton*, Cro. Eliz. 48; *Carman v. Pultz*, supra. Tender to one of several joint creditors sufficient. *Oatman v. Walker*, supra; *Dawson v. Ewing*, 16 Serg. & R. (Pa.) 371; *Flanigan v. Seelye*, 53 Minn. 23, 55 N. W. 115.

and it must be understood as a tender, and be absolute and unconditional.¹⁰⁸ It has also been held that the tender must be made at a reasonably fit time and place.¹⁰⁹

So, also, where goods are tendered in compliance with a contract of sale, the tender must comply with all the terms of the contract. An offer to deliver a greater or a less quantity than the contract calls for, is not a valid tender.¹¹⁰ It is also necessary that the buyer shall be given an opportunity to examine them if he chooses, so that he may satisfy himself that they comply with the terms of the contract; otherwise, he does not break the contract by refusing to accept them.¹¹¹

¹⁰⁸ *Hunter v. Warner*, 1 Wis. 141; *Potts v. Plaisted*, 30 Mich. 149; *Tompkins v. Batie*, 11 Neb. 147, 7 N. W. 747, 38 Am. Rep. 361; *Noyes v. Wyckoff*, 114 N. Y. 204, 21 N. E. 158; *Pulsifer v. Shepard*, 36 Ill. 513; *Odum v. Railroad Co.*, 94 Ala. 488, 10 South. 222; *Brooklyn Bank v. De Grauw*, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; *Appeals of Forest Oil Co.*, 118 Pa. 138, 12 Atl. 442, 4 Am. St. Rep. 584; *Rives v. Dudley*, 56 N. C. 126, 67 Am. Dec. 231; *Henderson v. Cass Co.*, 107 Mo. 50, 18 S. W. 992; *Cothran v. Scanlan*, 34 Ga. 555; *Rose v. Duncan*, 49 Ind. 269. Where the amount is disputed, an offer of less than the creditor claims, on condition that it be accepted in discharge of the debt, is not a valid tender, though no more than offered be due. *Thomas v. Evans*, 10 East, 101; *Wood v. Hitchcock*, 20 Wend. (N. Y.) 47; *Thayer v. Brackett*, 12 Mass. 450; *Richardson v. Laboratory*, 9 Metc. (Mass.) 42; *Chapin v. Chapin* (Mass.) 36 N. E. 746; *Elderkin v. Fellows*, 60 Wis. 339, 19 N. W. 101; *Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292; *Moore v. Norman*, 52 Minn. 83, 53 N. W. 809, 18 L. R. A. 359, 38 Am. St. Rep. 526; *Doty v. Crawford*, 39 S. C. 1, 17 S. E. 377; *Latham v. Hartford*, 27 Kan. 249; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 South. 202. Tender under protest, reserving right to dispute amount due, is good, if it does not impose conditions on creditor. *Greenwood v. Sutcliffe* [1892] 1 Ch. 1. Tender of amount due on a mortgage is not rendered invalid by fact that it is accompanied by condition that the mortgage be satisfied, since the condition is one which the mortgagee, on being paid, is bound to perform. *Halpin v. Insurance Co.*, 118 N. Y. 165, 23 N. E. 482. Contra, *Loring v. Cooke*, 3 Pick. (Mass.) 48; *Lindsay v. Matthews*, 17 Fla. 575. See *Jones, Mortg.* § 900. Tender to pledgee of amount secured is not vitiated by condition that pledge be delivered. *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435.

¹⁰⁹ *Waldron v. Murphy*, 40 Mich. 668.

¹¹⁰ *Dixon v. Fletcher*, 3 Mees. & W. 146; *Hart v. Mills*, 15 Mees. & W. 85; *Curliffe v. Harrison*, 6 Exch. 903; *Perry v. Iron Co.*, 16 R. I. 318, 15 Atl. 87; *Rommel v. Wingate*, 103 Mass. 327; *Croninger v. Crocker*, 62 N. Y. 151; *Tiffany, Sales*, 187.

¹¹¹ *Isherwood v. Whitmore*, 10 Mees. & W. 757; *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 542; *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17; *Tiffany, Sales*, 197.

DISCHARGE OF CONTRACT BY BREACH—IN GENERAL.

- 236. Breach of contract is where a party thereto breaks through the obligation which it imposes.**
- 237. The effect of a breach of contract is that—**
- (a) It always gives the party injured a right of action.
 - (b) It often, but not always, discharges the contract. This depends upon circumstances to be presently discussed.

If one of the parties to a contract breaks through the obligation which it imposes, a new obligation arises in every case,—a right of action conferred upon the party injured by the breach. Besides this, there are circumstances under which the breach will discharge the injured party from such performance as may still be due from him. Every breach of contract confers the right of action upon the injured party, but every breach does not necessarily discharge him from doing what he has undertaken to do under the contract. The contract may be broken wholly or in part, and, if in part, the breach may or may not be sufficiently important to operate as a discharge; or, if it is of such importance, the injured party may choose not to regard it as a discharge, preferring to continue to carry out the contract, reserving to himself the right to sue for such damages as he may have sustained by the breach. It is often very difficult to determine whether or not a breach of one of the terms of a contract discharges the party injured.¹¹² These questions will be discussed in the following pages.

FORMS OF DISCHARGE BY BREACH.

- 238. A contract may be broken in any one of three ways:**
- (a) A party may renounce his liabilities under it.
 - (b) He may by his own act make it impossible for him to fulfill his liabilities under it.
 - (c) He may totally or partially fail to perform what he has promised.

Of these three forms of breach, the first two may take place while the contract is still wholly executory; that is, before either party is entitled to demand a performance by the other of his promise. The last can only take place at or during the time for performance.¹¹³

¹¹² Anson, Cont. (4th Ed.) 276.

¹¹³ Anson, Cont. (4th Ed.) 280.

SAME—RENUNCIATION OF CONTRACT.

- 239.** Renunciation of a contract by one of the parties before the time for performance discharges the other party if he so chooses, but not otherwise, and entitles him to sue at once for the breach.¹¹⁴
- 240.** Renunciation of a contract by one of the parties in the course of performance discharges the other party from a continued performance of his promise, and entitles him to sue at once for the breach.¹¹⁵

Before Performance is Due.

The parties to a contract which is wholly executory have a right to something more than a performance of the contract when the time for performance arrives. They have a right to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due. It is therefore settled, by the great weight of authority, that the renunciation¹¹⁶ of a contract by one of the parties before the time for performance has come does not discharge the other unless the latter chooses to regard it as a discharge.¹¹⁷ If he chooses, he may so regard it, and at once sue for the breach.¹¹⁸ The discharge is optional with him. In a leading case on this point the defendant had engaged the plaintiff to enter into his service, the employment to commence at a future day, but before that time arrived he wrote the plaintiff that he should not require his services. The plaintiff at once

¹¹⁴ Anson, Cont. (4th Ed.) 280-283.

¹¹⁵ Anson, Cont. (4th Ed.) 284, 285.

¹¹⁶ There must be a positive and unqualified renunciation, and not a mere expression of intention not to perform. DINGLEY v. OLER, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; Vittum v. Estey, 67 Vt. 158, 31 Atl. 144.

¹¹⁷ FROST v. KNIGHT, L. R. 7 Exch. 111; Avery v. Bowden, 5 El. & Bl. 714; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Nilson v. Morse, 52 Wis. 240, 9 N. W. 1; KADISH v. YOUNG, 108 Ill. 170, 43 Am. Rep. 548; ZUCK v. McCLURE, 98 Pa. 541.

¹¹⁸ HOCHSTER v. DE LA TOUR, 2 El. & Bl. 678; FROST v. KNIGHT, L. R. 7 Exch. 111; Roper v. Johnson, L. R. 8 C. P. 167; ROEHM v. HORST, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; BURTIS v. THOMPSON, 42 N. Y. 246, 1 Am. Rep. 516; Fox v. Kitton, 19 Ill. 519; Crabtree v. Messersmith, 19 Iowa, 179; Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Chapman v. J. W. Beltz & Sons Co., 48 W. Va. 1, 35 S. E. 1013; Trammell v. Vaughan, 159 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302; Mutual Reserve Fund Life Ass'n v. Taylor, 99 Va. 208, 37 S. E. 854. So, also, in executory contracts of sale, if, before the time arrives, the purchaser repudiates the contract, the seller need not tender the goods, but may sue at once for the breach. Roper v. Johnson, supra; Eckenrode v. Chemical Co., 55 Md. 51; WINDMULLER v. POPE, 107 N. Y. 674, 14 N. E. 436; Bunge v. Koop, 48 N. Y. 225, 8 Am. Rep. 546; James v. Adams, 16 W. Va. 245; McCormick v. Basal, 44 Iowa, 235; ZUCK v. McCLURE, 98 Pa. 541; KADISH v. YOUNG, 108 Ill. 170, 43 Am. Rep. 548; Platt v. Brand, 26 Mich. 173.

sued for the breach of contract, though the time for performance had not arrived, and the court held that he was entitled to do so. It was said by the court that, "where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and * * * they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation."¹¹⁹ And in another case the defendant had agreed to marry the plaintiff upon his father's death, but renounced the contract, and the plaintiff was allowed to sue for the breach during the father's lifetime. "The promisee," it was said, "has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests."¹²⁰

The case just mentioned is authority for the statement that the operation of the rule is not affected by the fact that the performance is contingent, for in this case the father may have outlived the plaintiff or the defendant, in which case the time for performance never could arrive.

The rule laid down above is subject to limitations:¹²¹

(1) The renunciation must deal with so much of the performance to which the contract binds the promisor that an actual breach at the time of performance would operate as a discharge. This point was mentioned in a case in which a tenant claimed damages of his landlord for breach of contract by repudiation of a covenant to rebuild the premises at a period of the tenancy which had not yet arrived. "The contract," it was said, "was the whole lease. The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, I do not hesitate to say—though it is not necessary in this case to decide the point—that an anticipatory breach would not entitle him to do so,

¹¹⁹ HOCHSTER v. DE LA TOUR, 2 El. & Bl. 678.

¹²⁰ FROST v. KNIGHT, L. R. 7 Exch. 111.

¹²¹ It seems that if the obligation is merely to pay money, renunciation before payment falls due cannot have the effect of an anticipatory breach. See BURTIS v. THOMPSON, 42 N. Y. 246, 1 Am. Rep. 516; Nichols v. Steel Co., 137 N. Y. 471, 33 N. E. 561, 566; Flinn v. Mowry, 131 Cal. 481, 63 Pac. 724; Benecke v. Haebler, 38 App. Div. 344, 58 N. Y. Supp. 16, affirmed 166 N. Y. 631, 60 N. E. 1107. And it has been held that repudiation by the defendant after full performance by the plaintiff confers no right of action as for an anticipatory breach, on the ground that the defendant might elect to perform. Pittman v. Pittman (Ky.) 61 S. W. 461.

and that it does not appear to me that he could elect to rescind part of the contract." ¹²²

(2) The promisee must treat the renunciation by the promisor as a discharge. If he does not so treat the renunciation, but continues to insist on the performance of the promise, the contract remains in existence for the benefit, and at the risk, of both parties.¹²³ If anything occur, for instance, to discharge it from other causes, the promisor may take advantage of such discharge. A vessel owner agreed with a person, by charter party, that his ship should go to Odessa, and there take on a cargo from such person's agent. The vessel reached Odessa, and her master demanded a cargo, but the agent refused to supply one. The master, instead of treating this refusal as a breach of contract, and sailing away, in which event the vessel owner could have sued at once for breach of contract, continued to demand a cargo, and, before the running days were out,—before, therefore, a breach by nonperformance had occurred,—a war broke out, rendering performance of the contract legally impossible. Afterwards, the owner sued for breach of the charter party, but it was held that as there had been no actual failure of performance before the war broke out (for the running days had not then expired), and as the renunciation of the contract had not been accepted as a breach, the charterer was entitled to the discharge of the contract, which took place upon the declaration of war.¹²⁴

Though the rule as stated above is almost universally recognized, the Massachusetts court has held that a renunciation before the time for performance has arrived does not amount to a breach; that, to render a person liable "for breach of an executory personal contract, the other party must show a refusal or neglect to perform at a time

¹²² JOHNSTONE v. MILLING, 16 Q. B. Div. 460. And see Obermyer v. Nichols, 6 Bin. (Pa.) 159, 6 Am. Dec. 439.

¹²³ See cases cited supra, note 117. Where the other party had not elected to treat a repudiation as a breach, held that he was not excused for subsequent nonperformance. Smith v. Banking Co., 113 Ga. 975, 39 S. E. 410. Where one party renounces, the other is not bound to sue for a breach before the day fixed for performance arrives, and to have his damages assessed as of the date of the renunciation. KADISH v. YOUNG, 108 Ill. 170, 43 Am. Rep. 548; Roebing's Sons' Co. v. Fence Co., 130 Ill. 660, 22 N. E. 518. Cf. Davis v. Bronson, 2 N. D. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783. But a plaintiff may not after repudiation by the defendant go on with performance, and thereby increase his damages by a useless performance. CLARK v. MARSIGLIA, 1 Denio (N. Y.) 317, 43 Am. Dec. 670; LORD v. THOMAS, 64 N. Y. 107; GIBBONS v. BENTE, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; COLLYER v. MOULTON, 9 R. I. 90, 98 Am. Dec. 370; Heaver v. Lanahan, 74 Md. 493, 22 Atl. 263; Chicago Bldg. & Mfg. Co. v. Barry (Tenn. Ch. App.) 52 S. W. 451; Peck & Co. v. Corrugating Co., 96 Mo. App. 212, 70 S. W. 169.

¹²⁴ Avery v. Bowden, 5 El. & Bl. 714.

when, and under conditions such that, he is or might be entitled to require performance."¹²⁵

In the Course of Performance.

It may also happen that, in the course of performance of a contract, one of the parties may, by word or act, deliberately and avowedly refuse performance on his part. In such a case the other party is exonerated from a continued performance of his promise, and is at once entitled to bring action.¹²⁶ Illustrations of such a discharge are furnished by those cases in which a person contracts for the manufacture and supply of goods to be delivered in certain quantities at specified dates, and, after delivery of a part, the buyer notifies the seller not to deliver any more. In such a case, in an action by the sellers, in which they averred readiness and willingness to deliver the rest of the goods, and that they had been prevented from doing so by the buyer, it was contended by the buyer that they should show, not merely readiness and willingness to deliver, but actual delivery. The court, however, held the contrary, and stated the principle thus: "When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and * * * he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them."¹²⁷

¹²⁵ DANIELS v. NEWTON, 114 Mass. 530, 19 Am. Rep. 384. And see Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760. Cf. Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

¹²⁶ CORT v. RAILWAY CO., 17 Q. B. 127; Textor v. Hutchings, 62 Md. 150; Hosmer v. Wilson, 7 Mich. 293, 74 Am. Dec. 716; DERBY v. JOHNSON, 21 Vt. 17; James v. Adams, 16 W. Va. 245; Clement & Hawkes Mfg. Co. v. Meserole, 107 Mass. 362; PARKER v. RUSSELL, 133 Mass. 74; Haines v. Tucker, 50 N. H. 311; McCormick v. Basal, 46 Iowa, 235; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180; Amsden v. Atwood, 68 Vt. 322, 35 Atl. 311; North v. Mallory, 94 Md. 305, 51 Atl. 89.

¹²⁷ CORT v. RAILWAY CO., 17 Q. B. 127.

SAME—IMPOSSIBILITY CREATED BY PARTY.

241. If a party to a contract, either before the time for performance or in the course of performance, makes performance, or further performance, by him impossible, the other party is discharged, and may sue at once for breach of contract.

If before the time for performance has arrived one of the parties, by his own act, makes it impossible to perform, the other is discharged, and may sue at once for a breach, as in case of renunciation.¹²⁸ Where a lessee, for instance, had promised to assign to another, at any time within seven years from the date of the promise, all his interest in the lease, but before expiration of the seven years assigned his whole interest to another person, it was held that he could be sued at once for breach of contract. "The plaintiff," it was said in that case, "has a right to say to the defendant: 'You have placed yourself in a situation in which you cannot perform what you have promised. You promised to be ready during the period of seven years, and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but, if I now were to tender you the money, you would not be ready.' That is a breach of the contract."¹²⁹ The rule applies where a person promises to execute a lease for a certain term, or a conveyance, and, before the time for executing arrives, executes a conveyance, or a lease covering that term, to another;¹³⁰ or where a person promises to sell specific goods on a certain day, and, before that day, sells them to another;¹³¹ or where a person promises to marry, and, before the time for performance arrives, marries another than the promisee.¹³²

The rule is the same where a party to a contract, by his voluntary act, in the course of performance, makes performance by him impos-

¹²⁸ *Lovelock v. Franklyn*, 8 Q. B. 371; *Ford v. Tiley*, 6 Barn. & C. 325; *Bowdell v. Parsons*, 10 East, 359; *Crabtree v. Messersmith*, 19 Iowa, 179; *WOLF v. MARSH*, 54 Cal. 228; *Lovering v. Lovering*, 13 N. H. 513; *Newcomb v. Brackett*, 16 Mass. 161; *DELAMATER v. MILLER*, 1 Cow. (N. Y.) 75, 13 Am. Dec. 512; *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862.

¹²⁹ *Lovelock v. Franklyn*, 8 Q. B. 371.

¹³⁰ *Ford v. Tiley*, 6 Barn. & C. 325; *Synge v. Synge* (1894) 1 Q. B. 466; *Newcomb v. Brackett*, 16 Mass. 161; *Bassett v. Bassett*, 55 Me. 127. Contra, *Webb v. Stephenson*, 11 Wash. 342, 39 Pac. 952; *Garberino v. Roberts*, 109 Cal. 125, 41 Pac. 857.

¹³¹ *Bowdell v. Parsons*, 10 East, 359; *Hawley v. Keeler*, 53 N. Y. 114; *Smith v. Jordan*, 13 Minn. 264 (Gil. 246), 97 Am. Dec. 232; *Crist v. Armour*, 34 Barb. (N. Y.) 378; *Easton v. Jones*, 193 Pa. 147, 44 Atl. 264.

¹³² *SHORT v. STONE*, 8 Q. B. 358; *King v. Kersey*, 2 Ind. 402; *Sheahan v. Barry*, 27 Mich. 217; *Brown v. Odell*, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. Rep. 914.

sible.¹⁸³ An illustration is afforded in a case in which the plaintiff had been engaged by the defendants, for a certain sum, to write a treatise for a serial published by them. The plaintiff incurred expense in preparing his work, and actually completed a part of it, but before it was delivered to the defendants they abandoned the publication of the serial. The plaintiff sued them on the special contract, and also on the quantum meruit for the work and labor expended by him on the treatise. It was argued that he could not recover upon the quantum meruit because, his part of the original contract being unperformed, the contract was not wholly at an end; but the court held that the abandonment of the publication put an end to the contract, and constituted a discharge.¹⁸⁴

BREACH BY FAILURE OF PERFORMANCE.

242. Whether or not failure of one party to perform the contract in whole or in part operates as a discharge of the other, or merely gives him a right of action for the breach, depends upon the nature of the respective promises, or, in other words, on the question whether they are—

- (a) Independent of each other, in which case, as a rule, there is no discharge.
- (b) Conditional upon each other, in which case, as a rule, there is a discharge.

In the cases of discharge by breach with which we have thus far dealt, the party at fault so deals with the contract, by word or act, as to intimate to the other party that performance, or further performance, as the case may be, on his part, is needless. In such cases, as we have seen, the courts hold that the party not in default is not bound to tender performance, but may consider the contractual tie broken, and sue at once for the other's breach. These cases are very clear and simple; but where the breach by one party does not make the contract wholly incapable of performance, and is not accom-

¹⁸³ O'Neill v. Armstrong [1895] 2 Q. B. 70; Woolner v. Hill, 93 N. Y. 576; Lovell v. Insurance Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; Chicago v. Tilley, 103 U. S. 146, 26 L. Ed. 371; HINCKLEY v. STEEL CO., 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; Western Union Telegraph Co. v. Semmes, 73 Md. 9, 20 Atl. 127.

¹⁸⁴ PLANCHÉ v. COLBURN, 8 Bing. 14. So, also, where a person had been employed by a corporation for a number of years, and the company was voluntarily wound up before the time had expired, so that further performance by it was rendered impossible, the employé was permitted to sue at once for the breach of contract. *Ex parte Machure*, L. R. 5 Ch. App. 737. And see *Seipel v. Trust Co.*, 84 Pa. 47; *UNITED STATES v. BEHAN*, 110 U. S. 338, 4 Sup. Ct. 28, 28 L. Ed. 168; *Newhall Engineering Co. v. Daly*, 116 Wis. 256, 93 N. W. 12.

panied by any overt expression of intention to abandon his rights, it is not always easy to determine whether the other party is thereby discharged, or whether he merely acquires a right of action for the breach. It is necessary in these cases to look to the terms of the contract, and ascertain the intention of the parties as to the nature of their respective promises. The difficulties resolve themselves into the question whether the promises of the parties are independent of, or conditional upon, one another.¹³⁵ This question must be discussed at some length; but it may be well to state at the outset that, as a general rule, failure of a party to perform his promise does not discharge the other from liability to perform his, if the promises are independent of each other; but that it is, as a rule, otherwise, if the promises are conditional upon one another.

SAME—INDEPENDENT PROMISES.

243. Failure of one of the parties to a contract to perform an independent promise does not discharge the other party from liability to perform, but merely gives him a right of action for the breach.

244. A promise may be independent in the following ways:

- (a) It may be absolute,—that is, wholly unconditional upon performance by the other party; but promises, each of which forms the whole consideration for the other, will not be held independent of one another, unless the intention of the parties to make them independent is clear.
- (b) It may be divisible,—that is, the promise may be susceptible of more or less complete performance, and the damage sustained by an incomplete performance or partial breach may be apportioned according to the extent of the failure.
- (c) It may be subsidiary,—that is, the promise broken may be a term of the contract which the parties have not regarded as vital to its existence.

Absolute Promises.

If a person makes a promise to another in consideration of a promise by the latter to him, and has not in express terms, or upon a reasonable construction of the contract, made the performance of his promise depend upon performance by the other party, he is not discharged by the latter's breach of his promise.¹³⁶ He has given his promise in

¹³⁵ Anson, *Cont.* (4th Ed.) 286.

¹³⁶ *THORPE v. THORPE*, 12 Mod. 455; *THOMAS v. CADWALLADER*, Willes, 496; *WARE v. CHAPPELL*, Style, 186; *Dey v. Dox*, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; *Long v. Caffrey*, 93 Pa. 526; *Hard v. Seeley*, 47 Barb. (N. Y.) 428; *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427; *Kauffman v. Raeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; and cases hereafter cited.

consideration of the promise of the other party, and not in consideration of performance by the latter of his promise. In other words, he has accepted the latter's liability in return for his own promise.

When it has once been determined that mutual promises are absolute and independent of each other, there can be little difficulty in applying the law; but it is often very difficult to decide as to the character of a promise in this respect, and this difficulty has resulted in much conflict between the cases. The old cases turned upon a very technical construction of terms,¹³⁷ but the modern cases show that the tendency of the courts is not to construe promises to be absolute and independent of one another, where they form the whole consideration for one another, unless there is some very definite expression of an intention of the parties to that effect.¹³⁸ "Whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done."¹³⁹ The order in which the things are to be done is a very sure test for determining whether promises are absolute or not.¹⁴⁰ "When it appears that one of two covenants or promises is to be performed

¹³⁷ Rolle, Abr. p. 518; *WARE v. CHAPPELL*, Style, 186, and see *GLAZIE-BROOK v. WOODROW*, 8 Term R. 366. In 15 Hen. VII. p. 10, pl. 17, for instance, it was held that if A. covenant with B. to serve him for a year, and B. covenant with A. to give him a certain sum of money, and does not say "for the cause aforesaid," A. shall have an action for the money, though he never serves B., but that it is otherwise if B. says that A. shall have the money "for the cause aforesaid." See 2 Pars. Cont. note r, in which the old and modern cases are collected, and the law reviewed at length.

¹³⁸ Anson, Cont. (4th Ed.) 289; *MORTON v. LAMB*, 7 Term R. 125; *GRAVES v. LEGG*, 9 Exch. 709; *Dakin v. Williams*, 11 Wend. (N. Y.) 67; *Dey v. Dox*, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; *Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219; *Quigley v. De Haas*, 82 Pa. 267; *Lutz v. Thompson*, 87 N. C. 334; *Hamilton v. Thrall*, 7 Neb. 210; *Davis v. Jeffris*, 5 S. D. 352, 58 N. W. 815; post, p. 461.

¹³⁹ *MORTON v. LAMB*, 7 Term R. 125; *STAVERS v. CURLING*, 3 Bing. N. C. 355; *Proprietors of Mill-Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768; *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157; *City of New Orleans v. Texas & P. Ry. Co.*, 171 U. S. 312, 18 Sup. Ct. 875, 883, 43 L. Ed. 178.

¹⁴⁰ *MATTOCK v. KINGLAKE*, 10 Adol. & E. 50; *Couch v. Ingersol*, 2 Pick. (Mass.) 292; *Robson v. Bohn*, 27 Minn. 333, 7 N. W. 333; *State v. Railroad Co.*, 21 Minn. 472; *McCoy's Adm'r v. Bixbee's Adm'r*, 6 Ohio, 310, 27 Am. Dec. 258; *Slater v. Emerson*, 19 How. 224, 15 L. Ed. 626; *Front St. M. & O. R. Co. v. Butler*, 50 Cal. 574; *PHILLIPS & COLBY CONST. CO. v. SEYMOUR*, 91 U. S. 646, 23 L. Ed. 341; *Americal Emigrant Co. v. Adams County*, 100 U. S. 61, 25 L. Ed. 563; *Standard Gaslight Co. v. Wood*, 61 Fed. 74, 9 C. C. A. 362; *LOUD v. WATER CO.*, 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; *Reindl v. Heath*, 115 Wis. 219, 91 N. W. 734. "Where the act of one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will con-

at an earlier date than the other, * * * the rule is simple and uniform, namely, that the covenant or promise that is to be performed first is independent and absolute, while the one that is to be performed last is dependent, the performance of the former being a condition precedent to the performance of the latter."¹⁴¹ Where a person makes a promise to another to convey land, for instance, the date of performance not being fixed, and the other party, in consideration thereof, promises to pay a sum of money at a fixed date, it has been held that the payment is independent of the promise, and that, "a time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase money, without averring performance of the consideration."¹⁴² Where, on the other hand, mutual promises are to be performed at the same time, as where a person promises to convey land or deliver goods to another on a certain day, and the latter, in consideration thereof, promises to pay a sum of money on that day, neither can maintain an action on the other's promise without performing, or offering to perform, his part; and it makes no difference that it does not appear which promise was to be first performed.¹⁴³

Neither this nor any other test, however, can be relied upon in all cases, for often it does not appear when or in what order promises

stitute a condition precedent without express words." *Proprietors of Mill-Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417.

¹⁴¹ Langd. Sum. Cont. § 122; *Dey v. Dex*, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137.

¹⁴² *MATTOCK v. KINGLAKE*, 10 Adol. & E. 50. And see *Goldsborough v. Orr*, 8 Wheat. 217, 5 L. Ed. 600; *Bean v. Atwater*, 4 Conn. 3, 10 Am. Dec. 91; *Edgar v. Boies*, 11 Serg. & R. (Pa.) 445; *Lowry v. Mehaffy*, 10 Watts (Pa.) 387; *KANE v. HOOD*, 13 Pick. (Mass.) 281; *Headley v. Shaw*, 39 Ill. 354; *Tronson v. University*, 9 N. D. 559, 84 N. W. 474. "Where a contract for the sale of land provides for partial payments of the purchase money prior to delivery of the deed, the vendor may sue for such installments when due without tendering a conveyance. *Paine v. Brown*, 37 N. Y. 228; *Harrington v. Higgins*, 17 Wend. (N. Y.) 376. But when, after the installments are all due, the vendor brings an action for the purchase money, he is not entitled to recover without proving an offer before suit to convey. * * * When the last installment falls due, the payment of the whole of the unpaid purchase money and the conveyance of the land become dependent acts. *BEECHER v. CONRADT*, 13 N. Y. 108, 64 Am. Dec. 535. And the same rule applies when an action is brought for any installment payable at or after the term fixed for the delivery by the deed. *EDDY v. DAVIS*, 116 N. Y. 247, 22 N. E. 362, 363. See, also, *GRANT v. JOHNSON*, 5 N. Y. 247; *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558; *First Nat. Bank v. Spear*, 12 S. D. 108, 80 N. W. 166; *Shelley v. Mikkelsen*, 5 N. D. 22, 63 N. W. 210. Contra, *SHEEREN v. MOSES*, 84 Ill. 448. See *Harriman*, Cont. §§ 321, 322.

¹⁴³ See the cases above cited; *Williams v. Healey*, 3 Denio (N. Y.) 363; *Gazley v. Price*, 16 Johns. (N. Y.) 267; post, p. 459.

are to be performed. The question in each case is what intent is disclosed by the language employed.¹⁴⁴

Promises the Performance of Which is Divisible.

Contracts frequently occur in which the promise of one or both parties admits of a more or less complete performance, and the damage sustained by an incomplete performance or partial breach of which may be apportioned according to the extent of failure. The performance of the promise in such cases is said to be divisible. The promise is in fact regarded as a number of promises to do a number of similar acts, and a breach of one or some of them does not discharge the other party.¹⁴⁵ On the other hand, the promise may be indivisible or entire, and if it is so, and is not independent of the promise of the other party as heretofore explained, its entire performance is, as a rule, a condition concurrent or precedent to the liability of the other party to perform.¹⁴⁶

The question of divisibility is difficult, and this difficulty has resulted in a direct conflict in the decisions. The question is one of construction. "The contract may be entire or severable, according to the circumstances of each particular case," it has been said in speaking of contracts of sale, "and the criterion is to be found in the question whether the whole quantity—all of the things as a whole—is of the essence of the contract. If it appear that the purpose was to take

¹⁴⁴ *Loud v. Water Co.*, 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822; *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157; *Foley v. Dwyer*, 122 Mich. 587, 81 N. W. 569; *Griggs v. Moors*, 168 Mass. 354, 47 N. E. 128.

¹⁴⁵ *RITCHIE v. ATKINSON*, 10 East, 295; *Norris v. Harris*, 15 Cal. 226; *McGrath v. Cannon*, 55 Minn. 457, 57 N. W. 150; *Potsdamer v. Kruse*, 57 Minn. 193, 58 N. W. 983; *Fullmer v. Proust*, 155 Pa. 275, 26 Atl. 543, 35 Am. St. Rep. 881; *Gill v. Lumber Co.*, 151 Pa. 534, 25 Atl. 120; *Ming v. Corbin*, 142 N. Y. 334, 37 N. E. 105. Even where there is an entire contract for the sale of goods, although if the seller delivers a quantity less than he contracted to sell the buyer may reject them, it is generally held that if the buyer accepts them he must pay for them at the contract price, although the seller fails to deliver the rest. *OXENDALE v. WETHERELL*, 4 Man. & R. 429; *Bowker v. Hoyt*, 18 Pick. (Mass.) 555; *Booth v. Tyson*, 15 Vt. 515; *Clark v. Moore*, 3 Mich. 55; *Richards v. Shaw*, 67 Ill. 222; *Polhemus v. Heiman*, 45 Cal. 573; *McDonough v. Marble Co.*, 112 Fed. 634, 50 C. C. A. 403. Contra, *Champlin v. Rowley*, 18 Wend. (N. Y.) 187, 13 Wend. (N. Y.) 258; *CATLIN v. TOBIAS*, 26 N. Y. 217, 84 Am. Dec. 183; *Nightingale v. Eiseman*, 121 N. Y. 288, 24 N. E. 475; *Haslack v. Mayers*, 26 N. J. Law. 281; *Witherow v. Witherow*, 16 Ohio, 238. Even in New York the seller can recover, if the acceptance of part is made under such circumstances as to be a waiver of full performance, as where he is informed by the seller that he will not deliver the rest. *Avery v. Wilson*, 81 N. Y. 341, 37 Am. Rep. 503; *Silberman v. Fretz*, 16 Misc. Rep. 449, 38 N. Y. Supp. 151.

¹⁴⁶ *Hartup v. Crawford* (C. C.) 56 Fed. 61; *Widman v. Gay*, 104 Wis. 277, 80 N. W. 450.

the whole or none, then the contract would be entire; otherwise, it would be severable. * * * 'On the whole, the weight of opinion and the more reasonable rule would seem to be that, where there is a purchase of different articles, at different prices, at the same time, the contract would be severable as to each article, unless the taking of the whole was rendered essential either by the nature of the subject-matter or by the act of the parties.' This rule makes the interpretation of the contract depend on the intention of the parties as manifested by their acts, and by the circumstances of each particular case."¹⁴⁷ Though this was said in reference to contracts of sale, the reason applies to other contracts as well.¹⁴⁸

In a leading case the plaintiff had promised to take his ship to a port, and there load a complete cargo, and to deliver the same on being paid freight. He came away with an incomplete cargo, and the defendant refused to pay any freight on the ground that the completeness of the cargo was a condition precedent to any payment being due. Lord Ellenborough said that whether it was so or not depended, "not on any formal arrangement of words, but on the reason and sense of the thing, as it is to be collected from the whole contract; * * * here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery, leaving the defendant to his remedy in damages for the short delivery."¹⁴⁹

Same—Delivery by Installments.

Where there is a contract for the sale of goods deliverable in installments, which are to be paid for on delivery, and the seller makes defective delivery in respect to one installment, or the buyer fails to take delivery or to pay for an installment, the question arises whether the breach gives rise merely to a claim for compensation, or to a right to treat the whole contract as repudiated. It is difficult to reconcile the English decisions, some of which have held that a refusal to deliver or accept a particular installment is a breach going to the root of the contract,¹⁵⁰ and others have held the contrary.¹⁵¹ The leading case in the affirmative is *HOARE v. RENNIE*.¹⁵² In that case the defendant agreed to buy from the plaintiff 667 tons of iron, to be shipped from Sweden in about equal portions in each of the

¹⁴⁷ *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734.

¹⁴⁸ *Broumel v. Rayner*, 68 Md. 47, 11 Atl. 833.

¹⁴⁹ *ITCHIE v. ATKINSON*, 10 East, 295.

¹⁵⁰ *HOARE v. RENNIE*, 5 Hurl. & N. 19; *HONCK v. MULLER*, 7 Q. B. Div. 92.

¹⁵¹ *JONASSOHN v. YOUNG*, 4 Best & S. 296; *SIMPSON v. CRIPPIN*, L. R. 8 Q. B. 14; *FREETH v. BURR*, L. R. 9 C. P. 208.

¹⁵² 5 Hurl. & N. 19.

months of June, July, August, and September, and the plaintiff shipped only 20 tons in June, which the defendant refused to accept. It was held that delivery at the time specified was a condition precedent, and that the plaintiff could not maintain an action against the defendant for not accepting. The leading case in the negative is *SIMPSON v. CRIPPIN*.¹⁵³ In that case the defendant had agreed to supply the plaintiff with 6,000 or 8,000 tons of coal, to be delivered in the plaintiff's wagons at the defendant's colliery in equal monthly quantities during the period of 12 months from July 1st. During July the plaintiff sent wagons for 158 tons only, and on August 1st the defendant wrote that the contract was canceled on account of the plaintiff's failure to send for the full monthly quantity in the preceding month. It was held, in an action on the defendant's refusal to go on with the contract, that the breach in failing to send wagons in sufficient numbers in the first month, though a ground for compensation, did not justify the defendant in rescinding the contract. Finally, in *MERSEY STEEL & IRON CO. v. NAYLOR*,¹⁵⁴ it was decided that failure of the buyer to pay for the first installment upon delivery, unless the circumstances evince an intention on his part to be bound no longer by the contract, does not entitle the seller to rescind. The rule in England appears to be established by this decision that it is a question depending on the terms of the contract and the circumstances in the case whether the breach of contract is a repudiation of the whole contract, giving a right to put an end to it, or whether it merely gives rise to a claim for compensation.

In this country the same conflict has existed, some cases following *HOARE v. RENNIE*¹⁵⁵ and some *SIMPSON v. CRIPPIN*.¹⁵⁶ In

¹⁵³ L. R. 8 Q. B. 14.

¹⁵⁴ 9 App. Cas. 434, affirming 9 Q. B. Div. 648.

¹⁵⁵ *NORRINGTON v. WRIGHT*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; *Cleveland Rolling-Mill Co. v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304; *Clark v. Steel Works*, 3 C. C. A. 600, 53 Fed. 494; *Peace River Phosphate Co. v. Grafflin (C. C.)* 58 Fed. 550; *King Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603; *RUGG v. MOORE*, 110 Pa. 236, 1 Atl. 320; *Reyhold v. Voorhees*, 30 Pa. 116; *Robson v. Bohn*, 27 Minn. 333, 7 N. W. 357; *Providence Coal Co. v. Cox*, 19 R. I. 380, 582, 35 Atl. 210; *Cresswell Ranch & Cattle Co. v. Martindale*, 63 Fed. 84, 11 C. C. A. 33. See, also, *Dwinel v. Howard*, 30 Me. 258; *Walton v. Black*, 5 Houst (Del.) 149; *Bradley v. King*, 44 Ill. 339; *Stokes v. Baars*, 18 Fla. 656; *Higgins v. Railroad Co.*, 60 N. Y. 553.

¹⁵⁶ *Bollman v. Burt*, 61 Md. 415; *Blackburn v. Reilly*, 47 N. J. Law, 290, 1 Atl. 27, 54 Am. Rep. 159; *Trotter v. Heckscher*, 40 N. J. Eq. 612, 4 Atl. 83; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692; *Hansen v. Steam Heating Co.*, 73 Iowa, 77, 34 N. W. 495; *GERLI v. MANUFACTURING CO.*, 57 N. J. Law, 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611; *Mayor v. Schaub Bros.*, 96 Md. 534, 54 Atl. 106. And see *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791.

the Supreme Court of the United States in *NORRINGTON v. WRIGHT*,¹⁵⁷ the rule laid down in the first of these cases was approved. In *NORRINGTON v. WRIGHT* the contract was for the sale of "5,000 tons of iron rails, for shipment from European port or ports, at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August, 1880, at \$45 per ton, ex ship Philadelphia, settlement cash on presentation of bills," etc. It was held that the seller was bound to ship 1,000 tons in each month, and that only 400 tons having been shipped in February, and 885 tons in March, the buyer, although he had paid for the February shipment in ignorance of the defective shipments in that month and in March, had the right to rescind the whole contract for the defective deliveries in respect to the first installment. The decision rests on the ground that in contracts of merchants time is of the essence, and that the shipment at the time specified in the contract was a condition precedent, on failure of which the buyer might rescind the whole contract. It is to be noted that Gray, J., in commenting on *MERSEY STEEL & IRON CO. v. NAYLOR*, distinguishes that case, pointing out that the grounds of the decision, as stated by the lord chancellor, are applicable only to the case of failure by the buyer to pay for, and not to failure of the seller to deliver, the first installment; that is, that since delivery must precede payment no particular payment can be a condition precedent to the entire contract, and hence the payment cannot be a condition precedent to the subsequent fulfillment of the unfulfilled part, by delivery of subsequent installments.¹⁵⁸

Same—Repudiation of Contract.

The courts are agreed that if a default in one item of a continuous contract of this nature is accompanied with an announcement of intention not to perform the contract upon the agreed terms, the other party may treat the contract as being at an end.¹⁵⁹

Same—Express Provision for Discharge.

It is always permissible for the parties to agree that the entire performance of a consideration, in its nature divisible, shall be a condi-

¹⁵⁷ 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.

¹⁵⁸ Mere failure to pay, not evincing a purpose to renounce, held not to justify the seller in treating the contract as abandoned. *Monarch Cycle Mfg. Co. v. Wheel Co.*, 105 Fed. 324, 44 C. C. A. 523; *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. But see *Robson v. Bohn*, 27 Minn. 333, 7 N. W. 357; *RUGG v. MOORE*, 110 Pa. 236, 1 Atl. 320; *Hull Coal & Coke Co. v. Coke Co.*, 51 C. C. A. 213, 113 Fed. 256. Cf. *Beatty v. Lumber Co.*, 77 Minn. 272, 79 N. W. 1013.

¹⁵⁹ *WITHERS v. REYNOLDS*, 2 Barn. & Adol. 882; *CATLIN v. TOBIAS*, 26 N. Y. 217, 84 Am. Dec. 183; *Stephenson v. Cady*, 117 Mass. 6; ante, pp. 444, 447. And see *Bloomer v. Bernstein*, L. R. 9 C. P. 588.

tion precedent to the right to a fulfillment by the other party of his promise.¹⁶⁰ This point is illustrated by a case in which the master of a ship gave a sailor a note promising to pay him 30 guineas, which was more than the ordinary wages, "provided he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool." The sailor died after having performed the agreement for about seven weeks, but about three weeks before the ship reached Liverpool. The court held that the sailor's representatives could not recover upon the express contract, for its terms were unfulfilled; nor could they recover upon a quantum meruit for such services as he had rendered, because the terms of the express contract excluded the arising of any such implied contract as would form the basis of a claim upon a quantum meruit. "It may fairly be considered," it was said, "that the parties themselves understood that, if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage."¹⁶¹

Subsidiary Promises.

The breach committed by one of the parties may be a breach of a term of the contract only, and of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence. The injured party is then bound to continue his performance of the contract, but may bring an action to recover such damages as he has sustained by the default of the other.¹⁶² In a leading case, the plaintiff, a professional singer, had entered into a contract with the defendant, director of an opera, for his services as a singer for a considerable time, and upon a number of terms, one of which was that the plaintiff should be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals. The plaintiff broke this term by arriving only two days before the commencement of the engagement, and the defendant treated this breach as a discharge of the contract. The court held that, in the absence of any express declaration that the term was vital to the contract, it must "look to the whole contract, and see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different, in substance, from

¹⁶⁰ CUTTER v. POWELL, 6 Term. R. 320; 2 Smith, Lead. Cas. 1, and notes; Leonard v. Dyer, 26 Conn. 172, 68 Am. Dec. 382; Martin v. Shoenberger, 8 Watts & S. (Pa.) 367; Hartley v. Decker, 89 Pa. 470.

¹⁶¹ CUTTER v. POWELL, 6 Term R. 320.

¹⁶² TARRABOCHIA v. HICKIE, 1 Hurl. & N. 183; Weintz v. Hafner, 78 Ill. 27; BOONE v. EYRE, 1 H. Bl. 273, note. It is under this principle that a party is not discharged by failure of the other to perform within the time stipulated, where the time is not of the essence. Ante, pp. 408, 450.

what the defendant has stipulated for, or whether it merely partially affects it, and may be compensated for in damages;" and the court held that the term did not go to the root of the matter, so as to constitute a condition precedent.¹⁶³

Where a promise is to be performed in the course of the performance of the contract, and after some of the consideration, of which it forms a part, has been given, it will be regarded as subsidiary, and its breach will not effect a discharge unless there be words expressing that it is a condition precedent, or unless the performance of the thing promised be plainly essential to the contract.¹⁶⁴

CONDITIONAL PROMISES.

245. Where a promise is subject to a condition, that condition must, as regards its relation to the promise in time, be either—

- (a) **Subsequent,**
- (b) **Concurrent, or**
- (c) **Precedent.**

246. In the case of a condition subsequent, the rights of the promisee are determinable upon a specified event. The condition does not affect their commencement, but its occurrence brings them to a conclusion.

247. In the case of a condition concurrent, the promisee's rights are dependent upon his doing, or being ready to do, something simultaneously with the performance by the promisor.

248. In the case of a condition precedent, the promisee's rights do not arise until something has been done or has happened, or some period of time has elapsed.

249. Where the promise in a contract is conditional, the promisor may be discharged—

- (a) **By the promisee's failure to perform a concurrent condition.**
- (b) **By the fact that there has been a total or substantial failure on the promisee's part to do that which he was bound to do under the contract,—a state of things sometimes described as virtual failure of consideration.**
- (c) **By the untruth of some one statement, or the breach of some one term, which the parties considered to be vital to the contract.**

Conditions Subsequent.

We have already dealt with conditions subsequent in treating of discharge of contract by agreement, and it is unnecessary to speak further of them here.¹⁶⁵

¹⁶³ BETTINI v. GYE, 1 Q. B. Div. 183.

¹⁶⁴ Anson, Cont. (4th Ed.) 294, citing GRAVES v. LEGG, 9 Exch. 716; per Parke, B. See, also, CAMPBELL v. JONES, 6 Term R. 570.

¹⁶⁵ Ante, p. 427.

Breach of Concurrent Condition.

Concurrent conditions seem, in point of fact, to be conditions precedent, for the simultaneous performance of his promise by each party must needs be impossible except in contemplation of law. What is meant by the phrase is that there must be a concurrent readiness and willingness to perform, and that, if one is not able or willing to do his part, the other is discharged. This form of condition is more particularly applicable to contracts of sale, where payment and delivery are assumed, in the absence of express stipulation, to be intended to be contemporaneous.¹⁶⁶ Where goods are sold, and nothing is said as to the time of the delivery or the time of payment, the seller cannot demand payment of the price unless he is ready at the same time to deliver the goods, and the buyer cannot demand possession of the goods unless he is ready to pay the price.¹⁶⁷ In an action for breach of a contract by which the plaintiff had agreed to buy a certain quantity of corn of the defendant at a certain price, and the defendant had promised to deliver the corn within one month, the plaintiff merely alleged that he had always been ready and willing to receive the corn. The court held that as the plaintiff did not allege that he had been ready to pay the price, there was nothing, as he had shaped his case, to show that he had not himself broken the contract and discharged the defendant by nonreadiness to pay.¹⁶⁸

*Conditions Precedent—Suspensory Conditions.*¹⁶⁹

We are here dealing with the subject of discharge of contract, and are therefore concerned with those conditions precedent the nonfulfillment of which is a cause of discharge. To make the subject clear, however, we must mention and explain a class of conditions precedent which do not operate as a discharge, but merely suspend the operation of a promise until they are fulfilled. These are called by Anson floating or suspensory conditions. A promise, for instance, may be conditional upon the happening of an uncertain event, as in the case of a contract of fire or marine insurance, where the insurer's liability

¹⁶⁶ Anson, *Cont.* (4th Ed.) 298.

¹⁶⁷ *MORTON v. LAMB*, 7 Term R. 125; *Bloxam v. Sanders*, 4 Barn. & C. 941; *Stephenson v. Cady*, 117 Mass. 6; *HAPGOOD v. SHAW*, 105 Mass. 276; *Porter v. Rose*, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306; *Cook v. Ferral's Adm'rs*, 13 Wend. (N. Y.) 285; *Phelps v. Hubbard*, 51 Vt. 489; *Hough v. Rawson*, 17 Ill. 588; *Posey v. Scales*, 55 Ind. 282; *Simmons v. Green*, 35 Ohio St. 104; *Campbell v. Moran Bros. Co.*, 97 Fed. 477, 38 C. C. A. 293; *Allen v. Hartfield*, 76 Ill. 358. So, also, in case of a sale of real estate. *Smith v. Lewis*, 26 Conn. 110; *Swan v. Drury*, 22 Pick. (Mass.) 485; *Clark v. Weiss*, 87 Ill. 438, 29 Am. Rep. 60; *Gazley v. Price*, 16 Johns. (N. Y.) 267; *Columbia Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219. Ante, p. 452.

¹⁶⁸ *Morton v. Lamb*, 7 Term R. 125.

¹⁶⁹ Anson, *Cont.* (4th Ed.) 296, 297.

on his promise does not accrue until the loss of the property insured. The condition suspends the operation of the promise.

Again, a promise may depend upon the act of the promisor or of some third person. For instance, it may be made a condition precedent to one party's liability under the contract that he shall be satisfied with the other party's performance; and in such a case, by the weight of authority, he cannot be compelled to perform his part, unless he is satisfied.¹⁷⁰ Other examples are in the case of promises to pay for the construction of a building or other construction work, conditional upon the approval and certificate of the architect or other third person. In such cases payment cannot be enforced without such approval unless there is fraud, or such gross mistake as to necessarily imply bad faith.¹⁷¹

Again, a promise may be conditional in the sense that its operation is postponed until the lapse of a certain time, as in case of a debt for which a fixed period of credit is given, or until the happening of an event that is certain to happen, as in the case of a contract of life insurance.

Or, again, a promise may be conditional in the sense that its operation awaits the performance of some act to be done by the promisee. If no time is specified in which the act is to be done, the nonfulfillment of the condition merely suspends, and does not discharge, the rights of the promisee. Illustrations of such conditions are furnished by cases of promises conditional upon demand or notice. If a person promises another to do something upon demand, he cannot be sued until demand has been made;¹⁷² or if he promises to do something

¹⁷⁰ Ante, p. 432.

¹⁷¹ *MORGAN v. BIRNIE*, 9 Bing. 672; *Martinsburg & P. R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 3 Sup. Ct. 314, 27 L. Ed. 1053; *Chicago, S. F. & C. R. Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290, 34 L. Ed. 917; *Kennedy v. Poor*, 151 Pa. 472, 25 Atl. 119; *Lewis v. Railroad Co. (C. C.)* 49 Fed. 708; *Bradner v. Roffsell*, 57 N. J. Law, 412, 31 Atl. 387; *Gilmore v. Courtney*, 158 Ill. 432, 41 N. E. 1023; *Ashley v. Henahan*, 56 Ohio St. 559, 47 N. E. 573; *King v. City of Duluth*, 78 Minn. 155, 80 N. W. 874; *John Pritzlaff Hardware Co. v. Berghoefer*, 103 Wis. 359, 79 N. W. 564. Where the recovery of sick benefits depended on certificate of a physician, his refusal to make it did not excuse failure to produce it. *Audette v. L'Union St. Joseph*, 178 Mass. 113, 59 N. E. 668. Where there is fraud or bad faith, the action of the third person is not conclusive. *Baltimore & O. R. Co. v. Brydon*, 65 Md. 611, 9 Atl. 126, 57 Am. Rep. 318; *Whelen v. Boyd*, 114 Pa. 228, 6 Atl. 384; *Teal v. Bilby*, 123 U. S. 572, 8 Sup. Ct. 239, 31 L. Ed. 263. In New York it is held that failure to obtain the certificate will not defeat a recovery if it is refused unreasonably. *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634; *MacKnight Flintic Stone Co. v. City of New York*, 160 N. Y. 72, 54 N. E. 661. See, also, *Bird v. St. Johns Episcopal Church*, 154 Ind. 138, 56 N. E. 129. Cf. *Andette v. L'Union St. Joseph*, supra.

¹⁷² *Allen v. Allen*, 116 Iowa, 697, 88 N. W. 1091.

upon the happening of an event, and stipulates that notice shall be given him of the event having happened, he cannot be sued until such notice has been given. Even if there is no such stipulation for notice, yet, if the happening of the event is peculiarly within the knowledge of the promisee, an implied condition will be imported into the contract that notice must be given before a suit can be maintained.¹⁷³

Same—Vital Conditions.

In the cases last considered, neither the nonfulfillment of the condition nor an action brought before fulfillment will discharge the promisor. The condition merely suspends the right to performance of the promise.¹⁷⁴

The conditions with which we are now concerned effect a discharge of contract by their breach.

Where the promise of one party is conditional upon the promise of the other, the performance of the latter promise is either a condition precedent or a condition concurrent, as the case may be, and in either case the nonperformance of the condition not only gives ground for an action for breach of the contract, but discharges the contract. Where the promise of each party is the whole consideration for the promise of the other, and there is nothing to indicate that either was to perform first, or that the promises are independent, the case is one of concurrent conditions.¹⁷⁵

It may appear, however, either expressly, or impliedly from the nature of the contract, that one promise is to be performed before the other. In such a case, as we have seen, the promise which is to be first performed is independent, and the promisee may enforce it, or sue for its breach, without having performed, or offered to perform, on his part. The promise of the latter, on the other hand, is conditional; that is, performance by the other is a condition precedent to any liability to perform it.¹⁷⁶ If a person promises to work for another, or to build or repair a house for him, and the latter agrees to pay him certain compensation therefor, the promise to work or to build the house is impliedly, from the nature of the contract, to be first performed, and is independent. The promise to pay, on the

¹⁷³ MAKIN v. WATKINSON, L. R. 6 Exch. 25.

¹⁷⁴ Palmer v. Temple, 9 Adol. & E. 508.

¹⁷⁵ MORTON v. LAMB, 7 Term R. 125; GRAVES v. LEGG, 9 Exch. 709; Dakin v. Williams, 11 Wend. (N. Y.) 67; Dey v. Dox, 9 Wend. (N. Y.) 129, 24 Am. Dec. 137; People v. Glann, 70 Ill. 232; Columbia Bank v. Hagner, 1 Pet. 455, 7 L. Ed. 219; Quigley v. De Haas, 82 Pa. 267; Lutz v. Thompson, 87 N. C. 334; Clark v. Collier, 100 Cal. 256, 34 Pac. 677; Leslie v. Casey, 59 N. J. Law, 6, 35 Atl. 6; GRAY v. SMITH (C. C.) 76 Fed. 525. Ante, p. 459.

¹⁷⁶ Ante, p. 450.

other hand, is conditional. The servant¹⁷⁷ or contractor¹⁷⁸ cannot recover unless he shows a performance on his part, or unless he was prevented from fully performing by the other party, or by such an impossibility as excuses him. If a time is fixed for his performance, and it is of the essence of the contract, a failure to perform within that time will discharge the other party.¹⁷⁹

Same—Executory Contract of Sale.

In every executory contract of sale, where the goods are sold by description, there is an implied condition, often mis-called an implied warranty,¹⁸⁰ that the goods shall conform to the description. In such cases the tender of goods answering the description is a condition precedent to the buyer's liability, and if the condition is not per-

¹⁷⁷ If the servant without legal excuse abandons the employment before full performance, he can recover nothing for his services, neither upon the contract, because under an entire contract full performance is a condition precedent to the right of recovery thereon, nor upon an implied contract, because the special contract controls the rights of the parties in respect to what has been done under it, and excludes any implied contract. *STARK v. PARKER*, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; *Olmstead v. Beale*, 19 Pick. (Mass.) 528; *Miller v. Goddard*, 34 Me. 104, 56 Am. Dec. 638; *Lawrence v. Miller*, 86 N. Y. 131; *Goldstein v. White* (Com. Pl.) 16 N. Y. Supp. 860; *Hansell v. Erickson*, 28 Ill. 257; *Thrift v. Payne*, 71 Ill. 408; *Peterson v. Mayer*, 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72; *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719. But see *Hilderbrand v. American Fine Arts Co.* (Wis.) 85 N. W. 268, holding that a servant discharged for cause may recover for services rendered subject to the employer's right to recoup damages by reason of facts justifying discharge. In some states, however, a recovery upon a quantum meruit, to the extent of benefits received, is permitted, the recovery, if any, being estimated at the contract price, with deduction for what it would cost to procure a completion and of any damages sustained by reason of the breach. *BRITTON v. TURNER*, 6 N. H. 481, 26 Am. Dec. 713; *McClay v. Hodge*, 18 Iowa, 66; *Duncan v. Baker*, 21 Kan. 99; *Parcell v. McComber*, 11 Neb. 209, 11 N. W. 529, 38 Am. Rep. 366; *West v. Van Pelt*, 34 Neb. 63, 51 N. W. 313.

¹⁷⁸ *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160. As to substantial performance, ante, p. 431.

¹⁷⁹ *Carter v. Phillips*, 144 Mass. 100, 10 N. E. 500; *Goldsmith v. Guild*, 10 Allen (Mass.) 239; *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405; *Hicks v. Aylsworth*, 13 R. I. 562; *Wilson v. Roots*, 119 Ill. 379, 10 N. E. 204; *Chrisman v. Miller*, 21 Ill. 227; *Wynkoop v. Cowing*, 21 Ill. 570; *Grigg v. Landis*, 21 N. J. Eq. 494. In the case of a contract for sale of goods, failure to deliver at the time specified discharges the buyer, and he is not bound to accept a subsequent tender. *Welsh v. Gossler*, 89 N. Y. 540; *Jones v. U. S.*, 96 U. S. 24, 24 L. Ed. 644; ante, p. 408.

¹⁸⁰ "Two things are often confounded. * * * If a man offers to buy peas of another, and he sends him beans, he does not perform his contract. But that is not a warranty." Per Lord Abinger in *Chanter v. Hopkins*, 4 Mees. & W. 399. See, also, *Bowes v. Shand*, 2 App. Cas. 455, 480; *POPE v. ALLIS*, 115 U. S. 371, 6 Sup. Ct. 69, 29 L. Ed. 393.

formed he is entitled to reject the goods.¹⁸¹ Moreover, in a sale of goods by description, where the buyer has not an opportunity to examine the goods, there is also an implied condition that the goods shall be salable or merchantable,¹⁸² and under some circumstances a condition that goods ordered for a particular purpose are reasonably fit for that purpose is implied.¹⁸³ These implied conditions are frequently spoken of as warranties, but inasmuch as they go to the essence of the contract the latter term is misleading. The courts in different jurisdictions differ as to whether such a condition survives acceptance.¹⁸⁴ But all cases agree that where the property has not passed, the buyer is discharged by a failure of such an implied condition; and that he may reject the goods, and may also bring an action for such damages as he has sustained.¹⁸⁵ For the same reason, the buyer may reject the goods if they fail to conform to the quality which the seller warranted they should possess;¹⁸⁶ for an undertaking that goods shall possess a certain quality, whether in the form of a description or a warranty, is "a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because the existence of these qualities, being part of the description of the thing sold, becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."¹⁸⁷

¹⁸¹ *Josling v. Kingsford*, 32 L. J. C. P. 904; *Allan v. Lake*, 18 Q. B. 500; *POPE v. ALLIS*, 115 U. S. 363, 371, 6 Sup. Ct. 69, 29 L. Ed. 393; *Bagley v. Rolling-Mill Co.* (C. C.) 21 Fed. 159, 162. See, also, *NORRINGTON v. WRIGHT*, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366, per Gray, J.; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; *Jones v. George*, 61 Tex. 345, 349, 48 Am. Rep. 280; *Avery v. Miller*, 118 Mass. 500; *Haase v. Nonnemacher*, 21 Minn. 486, 490; *Dailey v. Green*, 15 Pa. 118; *Woodle v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102; *WOLCOTT v. MOUNT*, 36 N. J. Law, 262, 13 Am. Rep. 438; *Morse v. Moore*, 83 Me. 473, 479, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783. Although the sale is by sample, it is not enough that the bulk corresponds with the sample if it does not correspond with the description. *Michals v. Godts*, 10 Exch. 191.

¹⁸² *Jones v. Just*, L. R. 3 Q. B. 197; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; *English v. Commission Co.*, 57 Fed. 451, 6 C. C. A. 416.

¹⁸³ *Jones v. Just*, L. R. 3 Q. B. 197; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163.

¹⁸⁴ Post, p. 467.

¹⁸⁵ *POPE v. ALLIS*, 115 U. S. 363, 371, 6 Sup. Ct. 69, 29 L. Ed. 393; *Anson. Cont.* (8th Ed.) 302.

¹⁸⁶ *Street v. Blay*, 2 Barn. & Adol. 456; *Syers v. Jonas*, 2 Exch. 111, 117; *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 451; *Dailey v. Green*, 15 Pa. 126; *Doane v. Dunham*, 65 Ill. 512, 79 Ill. 131; *Cox v. Long*, 69 N. C. 7, 9; *Lewis v. Rountree*, 78 N. C. 323; *Byers v. Chapin*, 28 Ohio St. 300; *Bigger v. Bovard*, 20 Kan. 204; *Pothemus v. Heiman*, 45 Cal. 573.

¹⁸⁷ 2 Smith, Lead. Cas. (8th Am. Ed.) 31; *POPE v. ALLIS*, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393; *Benj. Sales*, § 895.

Same—Executed Contract of Sale.

Where the buyer has accepted the goods, it is held in England and in many jurisdictions in this country that he cannot afterwards reject them.¹⁸⁸ By accepting he waives his right to reject them, and must seek his remedy by action on the warranty or by setting up the breach in diminution of the price. And this applies whether the sale is of specific goods unconditionally—that is, goods ascertained and agreed upon at the time of the contract—or whether the sale is of unascertained goods, which are subsequently accepted. In some states, however, where there is an express warranty, it is held that the buyer may rescind the contract for breach of the warranty, notwithstanding acceptance, and may return the goods.¹⁸⁹

Same—Conditions Precedent in Narrower Sense.

In the cases with which we have just been dealing, one of the parties to a contract has been excused from performance of his promise by reason of the entire failure of the other party to perform his promise. We now come to what Sir William Anson calls conditions precedent in the narrower and more frequent use of the term as meaning a single term in the contract, but a term possessing a particular character. In this sense a condition precedent is a statement or promise, the untruth or nonperformance of which discharges the contract.¹⁹⁰

The chief difficulty with regard to conditions precedent consists in

¹⁸⁸ *Street v. Blay*, 2 Barn. & Adol. 456; *Gompertz v. Denton*, 1 Crompt. & M. 207; *Poulton v. Lattimore*, 9 Barn. & C. 259; *Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595; *Matteson v. Holt*, 45 Vt. 336; *FREYMAN v. KNECHT*, 78 Pa. 141; *Muller v. Eno*, 14 N. Y. 597; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 269, 23 N. E. 372, 16 Am. St. Rep. 753; *Hoover v. Sidener*, 98 Ind. 290; *Merrick v. Wiltse*, 37 Minn. 41, 33 N. W. 3; *Wright v. Davenport*, 44 Tex. 164.

¹⁸⁹ *BRYANT v. ISBURGH*, 13 Gray (Mass.) 607; *Smith v. Hale*, 158 Mass. 178, 33 N. E. 493, 35 Am. St. Rep. 485; *Marshall v. Perry*, 67 Me. 78; *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Sparling v. Marks*, 86 Ill. 125; *Branson v. Turner*, 77 Mo. 489; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557, 29 N. W. 621; *Boothby v. Scales*, 27 Wis. 626.

¹⁹⁰ *Anson*, *Cont.* (4th Ed.) 303. See *BEHN v. BURNES*, 3 Best & S. 751; *GLANHOLM v. HAYS*, 2 Man. & G. 257; *Bowes v. Shand*, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728, 17 L. Ed. 768; *Cleveland Rolling-Mill v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372; *DAVISON v. VON LINGEN*, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885; *People v. Glann*, 70 Ill. 232; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 509; *Newhall v. Clark*, 3 Cush. (Mass.) 376, 50 Am. Dec. 741; *Husted v. Craig*, 36 N. Y. 221; *Ogden v. Kirby*, 79 Ill. 555; *Harder v. Commissioners*, 97 Ind. 455; *Bell v. Hoffman*, 92 N. C. 273; *Salmon v. Boykin*, 66 Md. 541, 7 Atl. 701. "A statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which the term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or nonperformance of which

determining whether or not the parties to a contract regarded a particular term as essential. If they did, the term is a condition, and its failure discharges the contract; if they did not, the term is a warranty, and its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term. Conditions are to be distinguished from warranties, although both terms are often loosely, and even interchangeably, used. The word "warranty," says Sir William Anson, is used in a most confusing manner and in a great variety of senses, but in its primary sense it is a more or less unqualified promise of indemnity against a failure in the performance of a term in the contract. It is "an express or implied statement of something which the party undertakes shall be a part of a contract, and though part of the contract, yet collateral to the express object of it."¹⁹¹ If the statement of a party in a contract that a certain thing is true is a condition, the other party is discharged if it is false; but if the statement is a warranty, only, the other party is not discharged, but merely has a right of action for breach of the warranty. A warranty is a mere promise to indemnify.¹⁹²

The question whether a particular term in a contract is a condition precedent or a warranty depends upon the construction of each particular contract. The question is to be determined by the intention of the parties, and by the application of common sense to each particular case; and, when the intention is once discovered, it will control technical forms of expression.¹⁹³ As said in a leading case: "Parties may think some matter, apparently of very little importance, essential, and, if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and, if they sufficiently express such an intention, it will not be a condition precedent."¹⁹⁴ In other words, the question in each case, where it is to be determined whether a breach of a particular term operates as a discharge, is whether or not the breach goes to the essence of the contract.¹⁹⁵

the party aggrieved may repudiate the whole contract." *NORRINGTON v. WRIGHT*, 115 U. S. 188, 203. 6 Sup. Ct. 12, 29 L. Ed. 366.

¹⁹¹ *Chanter v. Hopkins*, 4 Mees. & W. 399. See, also, *Dorr v. Fisher*, 1 Cush. (Mass.) 271.

¹⁹² *Ante*, p. 209.

¹⁹³ *STAVERS v. CURLING*, 3 Bing. N. C. 355.

¹⁹⁴ *BETTINI v. GYE*, 1 Q. B. Div. 183. And see *GRAVES v. LEGG*, 9 Exch. 709; *BEHN v. BURNES*, 3 Best & S. 756; *Watchman v. Crook*, 5 Gill. & J. (Md.) 239; *Maryland Fertilizing & Mfg. Co. v. Lorentz*, 44 Md. 218; *GRANT v. JOHNSON*, 5 N. Y. 247; *Knight v. Worsted Co.*, 2 Cush.

¹⁹⁵ See note 195 on following page.

A condition precedent may assume the form either of a statement or of a promise.

Waiver and Acquiescence in Breach of Condition.

A condition precedent may, in the course of the performance of the contract, change its character, and in effect cease to be a condition. Acquiescence in its breach may in effect turn it into a mere warranty. In other words, a breach of condition, which would discharge a party if at once treated by him as a discharge, will not have this effect if he goes on with the contract instead of repudiating it, and takes a benefit under it; but in such a case he can only recover his damages.¹⁹⁶ "Although conditions precedent must be performed, and a partial performance is not sufficient, yet when a contract has been performed in a substantial part, and the other party has voluntarily received and accepted the benefit of the part performance, knowing that the contract was not being fully performed, the latter may be thereby precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received, and may be compelled to rely upon his claim for damages in respect to the defective performance."¹⁹⁷

An illustration of such a change in the effect of a condition is afforded by a leading English case, in which it appeared that the defendant had chartered the plaintiff's vessel for a certain voyage, and promised to pay a certain sum in full for her use on condition of her taking a cargo of not less than 1,000 tons. The defendant had the use of the vessel as agreed upon, but it appeared that she was not capable of holding so large a cargo as had been made a condition of the contract. To an action brought for nonpayment of the freight, the defendant pleaded a breach of this condition. The term in the

(Mass.) 271, 287; *Mill-Dam Foundry v. Hovey*, 21 Pick. (Mass.) 417, per Shaw, C. J. Ante, p. 451.

¹⁹⁶ *FREEMAN v. TAYLOR*, 8 Bing. 124; *FRANKLIN v. MILLER*, 4 Adol. & E. 599; *TARRABOCHIA v. HICKIE*, 1 Hurl. & N. 183; *McANDREW v. CHAPPLE*, L. R. 1 C. P. 706; *BRADFORD v. WILLIAMS*, L. R. 7 Exch. 259; *Jackson v. Insurance Co.*, L. R. 10 C. P. 125; *POUSSARD v. SPIERS*, 1 Q. B. Div. 410; *Rioux v. Brick Co.*, 72 Vt. 148, 47 Atl. 406; *West v. Bechtel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. As to waiver of full performance. *District of Columbia v. Iron Works*, 181 U. S. 453, 21 Sup. Ct. 680, 45 L. Ed. 948.

¹⁹⁷ *BEHN v. BURNES*, 3 Best & S. 756; *GRAVES v. LEGG*, 9 Exch. 709; *PUST v. DOWIE*, Law J. 32 Q. B. 179; *PHILLIPS & COLBY CONST. CO. v. SEYMOUR*, 91 U. S. 646, 23 L. Ed. 341; *Wiley v. Inhabitants of Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342; *Sykes v. City of St. Cloud*, 60 Minn. 442, 62 N. W. 613; *Young Bros. Mach. Co. v. Young*, 111 Mich. 118, 69 N. W. 152; *Charley v. Potthoff*, (Wis.) 95 N. W. 124; *Carter v. Scargill*, L. R. 10 Q. B. 564; *Bechtel v. Cone*, 52 Md. 698; *Foley v. Crow*, 37 Md. 51.

¹⁹⁷ *Wiley v. Inhabitants of Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342, per Field, J.

contract which has been described was held to have amounted, in its inception, to a condition, and it was said that the defendant, while the contract was still executory, might have rescinded, and refused to put any goods on board, but as the contract had been executed, and the defendant had received a substantial part of the consideration, he could not rescind the contract, but must be left to his cross action for damages.¹⁹⁸

A further illustration is found in the case of an executed sale. We have already seen that in an executory sale an undertaking that goods shall possess a certain quality is in effect a condition, and that where goods are sold by description it is an implied condition that they shall conform to the description, and that under some circumstances other conditions, such as that the goods shall be merchantable, will be implied.¹⁹⁹ In such cases, where the goods tendered do not fulfill the conditions, it is very generally held that the buyer may nevertheless accept them, and in effect treat the breach of condition as a breach of warranty.²⁰⁰ Some cases, however, draw a distinction between conditions and warranties, and hold that, while an express warranty survives acceptance, a condition that the goods shall be of a certain description does not survive, so far as concerns visible defects, when the buyer had an opportunity to inspect, but that if, after opportunity for inspection, the buyer accepts the goods, he is precluded from recovering damages for any variation between the goods as delivered and as described.²⁰¹

It seems that the performance must be of a substantial part of the contract,²⁰² and that the acceptance must be under such circumstances

¹⁹⁸ *PUST v. DOWIE*, Law J. 32 Q. B. 179.

¹⁹⁹ Ante, p. 462.

²⁰⁰ *Bagley v. Rolling-Mill Co.* (C. C.) 21 Fed. 159; *English v. Commission Co.* (C. C.) 48 Fed. 197; *Id.*, 6 C. C. A. 416, 57 Fed. 451; *Reynolds v. Palmer* (C. C.) 21 Fed. 433; *Wolcott v. Mount*, 36 N. J. Law, 262, 13 Am. Rep. 438; *Holloway v. Jacoby*, 120 Pa. 583, 15 Atl. 487, 6 Am. St. Rep. 737; *Lewis v. Rountree*, 78 N. C. 323; *Eagan Co. v. Johnson*, 82 Ala. 233, 2 South. 302; *Dayton v. Hooglund*, 39 Ohio St. 671; *Morse v. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224, 23 Am. St. Rep. 783; *Tacoma Coal Co. v. Bradley*, 2 Wash. St. 600, 27 Pac. 454. See, also, *Marsh v. McPherson*, 105 U. S. 709, 26 L. Ed. 1139.

²⁰¹ *Haase v. Nonnemacher*, 21 Minn. 486; *Maxwell v. Lee*, 34 Minn. 511, 27 N. W. 196; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150 (implied condition of merchantableness does not survive acceptance in respect to visible defects); *Comstock v. Sanger*, 51 Mich. 497, 16 N. W. 872; *McClure v. Jefferson*, 85 Wis. 208, 54 N. W. 777. This rule prevails in New York, *Coplay Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. 335; except as to a warranty that goods shall conform to sample, *Zabriskie v. Railroad Co.*, 131 N. Y. 72, 29 N. E. 1006.

²⁰² *Anson, Cont.* (4th Ed.) 308, citing *ELLEN v. TOPP*, 6 Exch. 424.

as to show that the party accepting knew, or ought to have known, that the contract was not being fully performed.²⁰³

Breach Caused by the Other Party.

Though performance by one party of a part or the whole of his promise may be a condition precedent to the liability of the other party to perform, still his failure to perform will not discharge the latter, if the latter prevented performance. In such a case the party so prevented is discharged from further performance, and may recover damages for the breach or recover on the quantum meruit for his part performance.²⁰⁴

Failure of Consideration.

"Strictly speaking, there can be no such thing as a failure of consideration. Either the promisor receives the consideration he bargained for, or he does not. If he does not receive the consideration, there is no contract; if he does receive the consideration, there can be no failure of consideration thereafter."²⁰⁵ The term is, however, frequently used to express the situation which arises where the promisee fails wholly or partly to perform a promise which was the consideration of the promise of the promisor. Some cases usually considered under the head of failure of consideration may be mentioned here.

As we have seen, where there is a contract for the sale of goods by description it is an implied condition of the contract that the goods shall correspond to the description. By accepting the goods tendered, indeed, the buyer is ordinarily held to have waived his right to rely on the condition, and the condition, in effect, becomes a warranty.²⁰⁶ Where, however, a thing is sold as being an article of a specific description, and from latent defect, unknown to the buyer, it is in substance not an article of that description, but an article of no value, the buyer may rescind the sale notwithstanding acceptance, and may defend an action for the price or may recover the price if he has paid it. In such cases it is commonly said that there has been a total failure of consideration. Such a state of facts occurs where the thing sold is

²⁰³ *Wiley v. Inhabitants of Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342, per Field, J.

²⁰⁴ Ante, p. 444; *UNITED STATES v. BEHAN*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; *HINCKLEY v. STEEL CO.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Hood v. Exploration Co. (C. C.)* 106 Fed. 408; *Mooney v. Iron Co.*, 82 Mich. 263, 46 N. W. 376; *Caldwell v. Myers*, 2 S. D. 506, 51 N. W. 210; *Thompson v. Gaffey*, 52 Neb. 317, 72 N. W. 314; *Wellston Coal Co. v. Paper Co.*, 57 Ohio St. 182, 48 N. E. 888; *Southern Pac. Co. v. Well Works*, 172 Ill. 9, 49 N. E. 575; *San Francisco Bridge Co. v. Improvement Co.*, 119 Cal. 272, 51 Pac. 335.

²⁰⁵ *Harriman*, Cont. § 521. See 9 Cyc. Law & Proc. 369.

²⁰⁶ Ante, p. 467.

a bill or note or other security, and it turns out to be invalid because of forgery²⁰⁷ or for other causes;²⁰⁸ the instrument thus being not what it purports to be, but a mere worthless piece of paper. So in the sale of a patent, if the patent is void.²⁰⁹ But though the thing sold thus proves to be worthless, if the buyer assumed the risk of its validity, and consequently obtained the identical thing which he intended to buy, there is no failure of consideration.²¹⁰

Where on the sale of personal property the buyer accepts the goods, he may still bring an action for damages if the goods are inferior in quality to that warranted; or, instead of bringing an action for damages, he may wait till he is sued for the price, and then set up the breach of warranty in diminution of the price *pro tanto* as a defense.²¹¹ And to-day in most states such damages may be set up by way of defense in an action on a note given for the price.²¹² In such cases, where the article sold by reason of failure to conform to the warranty

²⁰⁷ JONES v. RYDE, 5 Taunt. 488; GURNEY v. WOMERSLEY, 4 El. & Bl. 133; Terry v. Bissell, 26 Conn. 23; Aldrich v. Jackson, 5 R. I. 218; Merriam v. Wolcott, 3 Allen (Mass.) 258, 80 Am. Dec. 69. See, also, Whitney v. Bank, 45 N. Y. 303; Bell v. Dagg, 60 N. Y. 528.

²⁰⁸ Burchfield v. Moore, 2 El. & Bl. 683 (material alteration); Gompertz v. Bartlett, 2 El. & Bl. 849, 23 Law J. Q. B. 65 (a bill of exchange purporting to be a foreign bill, which turned out to be a domestic bill, and invalid because unstamped); WOOD v. SHELDON, 42 N. J. L. 421, 36 Am. Rep. 523 (scrip illegally and fraudulently issued); Paul v. City of Kenosha, 22 Wis. 206, 94 Am. Dec. 598; Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199 (bond stricken with nullity by constitutional provision adopted after act authorizing issue).

²⁰⁹ Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Harlow v. Putnam, 124 Mass. 553; Shepherd v. Jenkins, 73 Mo. 510; Green v. Stuart, 7 Baxt. (Penn.) 418; Herzog v. Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646. Cf. Chemical Electric Light & Power Co. v. Howard, 148 Mass. 352, 20 N. E. 92, 2 L. R. A. 168; Gloucester Isin-Glass & Glue Co. v. Cement Co., 154 Mass. 92, 27 N. E. 1005, 2 L. R. A. 563, 26 Am. St. Rep. 214.

²¹⁰ Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Blattenberger v. Holman, 103 Pa. 555; Neidefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198; WHEAT v. CROSS, 31 Md. 99, 1 Am. Rep. 28; Hunting v. Downer, 151 Mass. 275, 23 N. E. 832. On this principle, it has been held that where bonds are sold which are invalid because the consideration has not power to issue them, or failed to comply with the law in their issuance, the purchaser is liable on his promise to pay. Otis v. Cullum, 92 U. S. 447, 23 L. Ed. 496; Harvey v. Dale, 96 Cal. 160, 31 Pac. 14; Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 98. But see Hurd v. Hall, 12 Wis. 136.

²¹¹ Mondel v. Steel, 8 Mees. & W. 858; Lyon v. Bertram, 20 How. 149, 154, 15 L. Ed. 847; Bradley v. Rea, 14 Allen (Mass.) 20; Dailey v. Green, 15 Pa. 118, 126; Dayton v. Hooglund, 39 Ohio St. 671; Underwood v. Wolf, 131 Ill. 425, 23 N. E. 598, 19 Am. St. Rep. 40; Morehouse v. Comstock, 42 Wis. 626; Polhemus v. Heiman, 45 Cal. 573; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Central Trust Co. v. Manufacturing Co., 77 Md. 202, 26 Atl. 493.

²¹² Withers v. Greene, 9 How. 213, 13 L. Ed. 109; Ruff v. Jarrett, 94 Ill. 475; Wentworth v. Dows, 117 Mass. 14, per Colt, J.; Wright v. Davenport,

is wholly worthless, so that the breach of warranty is a complete defense, it is often said that there is an entire failure of consideration;²¹³ and if the damages recoverable for the breach of warranty would simply reduce the amount of the recovery, it is often said that there has been a partial failure of consideration.²¹⁴

Again, upon a sale of personal property, the seller impliedly warrants his title to the goods sold, unless the circumstances are such as to show that the seller is transferring only such property as he had in the goods.²¹⁵ Where the circumstances are such that a warranty of title is to be implied, if it turns out that the seller was not in fact the owner, it is said that the consideration fails, and in such case the buyer can defend an action for the price, or recover it if he has paid it.²¹⁶

Where the subject-matter of the sale is land, and it turns out that the vendor had no title, the purchaser may interpose the failure of title as a defense in an action for the price or upon notes given therefor.²¹⁷ In the case of the sale of land with covenants by the vendor, questions have arisen as to whether the failure of the title amounts to a total failure of consideration. In a Massachusetts case a note had been given in consideration of a conveyance of land by deed, with the usual covenants of seisin and warranty, and the title to the land failed entirely. The question raised was whether that want of title was an entire want of consideration for the note, so as to render it nudum pactum, or whether the covenants in the deed were of themselves a sufficient consideration. It was held, contrary to a decision in Maine,²¹⁸ that the total failure of title was a total failure of consideration, and that the note was therefore void. "The promise is not made for a promise," it was said, "but for the land. The moving cause

44 Tex. 164; *Bayview Brewing Co. v. Techlenberg*, 19 Wash. 469, 53 Pac. 724.

²¹³ *Thompson v. Manufacturing Co.*, 29 Kan. 476; *Toledo Sav. Bank v. Rathmann*, 78 Iowa, 756, 43 N. W. 193; *Aultman, & Taylor Co. v. Trainer*, 80 Iowa, 451, 45 N. W. 757; *Brown v. Weldon*, 99 Mo. 564, 13 S. W. 342.

²¹⁴ *Stevens v. Johnson*, 28 Minn. 172, 9 N. W. 677; *Nichols & Shepard Co. v. Soderquist*, 77 Minn. 509; *Russ Lumber & Mill Co. v. Water Co.*, 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

²¹⁵ *Benj. Sales* (6th Am. Ed.) § 639; *Tiffany, Sales*, 165.

²¹⁶ *EICHHIOLZ v. BANNISTER*, 17 C. B. (N. S.) 708; *Chenault v. Bush*, 84 Ky. 528, 2 S. W. 160; *Flandrow v. Hammond*, 148 N. Y. 129, 42 N. E. 511. And see *Gould v. Bourgeois*, 51 N. J. Law, 361, 18 Atl. 64.

²¹⁷ *Murphy v. Jones*, 7 Ind. 529; *Anderson v. Armstead*, 69 Ill. 452; *Ferguson v. Teel*, 82 Va. 690; *Curtis v. Clark*, 133 Mass. 509; *Baird v. Laevison*, 91 Ky. 204, 15 S. W. 252; *Redding v. Lamb*, 81 Mich. 318, 45 N. W. 997; *Hall v. McArthur*, 82 Ga. 572, 9 S. E. 534.

²¹⁸ *Jenness v. Parker*, 24 Me. 289; *Lloyd v. Jewell*, 1 Greenl. (Me.) 360, 10 Am. Dec. 73. And see *Black v. Walker*, 98 Ga. 31, 26 S. E. 477; *Bennett v. Pierce*, 45 W. Va. 654, 31 S. E. 972.

is the estate, and, if that fails to pass, the promise is a mere nudum pactum." ²¹⁹

Same—Subsequent Failure of Executed Consideration.

If the promisor receives a consideration for his promise, the fact that it subsequently diminishes in value, or becomes worthless, does not release him from liability on his promise.²²⁰ The transfer and delivery of a note, for instance, by the payee to the maker of another note, in exchange therefor, is a valuable consideration for the latter note, and the fact that the former note subsequently becomes worthless does not constitute a failure of consideration.²²¹ So, if a patent is sold, the fact that it afterwards becomes valueless because of improvements does not release the purchaser from liability for the purchase money.²²²

Recovery of Money Paid.

Ordinarily, if a person voluntarily pays another money, he cannot maintain an action to recover it back. This rule, however, does not apply where money is paid under a contract, and the consideration fails. The money may be recovered back in such a case.²²³

²¹⁹ *Rice v. Goddard*, 14 Pick. (Mass.) 293. And see *Frisbee v. Hoffnagle*, 11 Johns. (N. Y.) 50; *McAllister v. Reab*, 4 Wend. (N. Y.) 483; *Durment v. Tuttle*, 50 Minn. 426, 52 N. W. 909; *Steinhauer v. Witman*, 1 Serg. & R. (Pa.) 447; *Gray v. Handkinson's Heirs*, 1 Bay (S. C.) 278; *Bell's Adm'r v. Huggins' Adm'rs*, Id. 327; *Trask v. Vinson*, 20 Pick. (Mass.) 110; *Chandler v. Marsh*, 3 Vt. 162; *Cook v. Mix*, 11 Conn. 432; *Tillotson v. Grapes*, 4 N. H. 448; *Tyler v. Young*, 2 Scam. (Ill.) 447, 35 Am. Dec. 116; *Davis v. McVickers*, 11 Ill. 327. But see *Sunderland v. Bell*, 39 Kan. 21, 17 Pac. 600; *McLeod v. Barnum*, 131 Cal. 605, 63 Pac. 924.

²²⁰ *Rice v. Grange*, 131 N. Y. 149, 30 N. E. 46; *Harmon v. Bird*, 22 Wend. (N. Y.) 113; *Perry v. Buckman*, 33 Vt. 7; *Potter v. Earnest*, 45 Ind. 416; *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269; *Blackman v. Dowling*, 63 Ala. 304; *Byrne v. Cummings*, 41 Miss. 192; *Daniel v. Tarver*, 70 Ga. 203; *Dowdy v. McLellan*, 52 Ga. 408; *Bean v. Proseus* (Cal.) 31 Pac. 49; *Topp v. White*, 12 Heisk. (Tenn.) 165.

²²¹ *Rice v. Grange*, 131 N. Y. 149, 30 N. E. 46.

²²² *Harmon v. Bird*, 22 Wend. (N. Y.) 113.

²²³ *GILES v. EDWARDS*, 7 T. R. 181; *CLAFILIN v. GODFREY*, 21 Pick. (Mass.) 1; *Steele v. Hobbs*, 16 Ill. 59; *Darst v. Brockway*, 11 Ohio. 462; *Foss v. Richardson*, 15 Gray. (Mass.) 303; *Chapman v. City of Brooklyn*, 40 N. Y. 372; *Leach v. Tilton*, 40 N. H. 473; *Richter v. Stock Co.*, 129 Cal. 367, 62 Pac. 39. And see cases cited supra, notes 207-209. The obligation to repay is quasi contractual.

DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.

250. Impossibility of performance arising subsequent to the formation of a contract does not discharge the promisor, even though he was not in fault, except—

EXCEPTIONS—(a) Where the impossibility is created by law.

(b) Where the subject-matter is destroyed, the rule being that, where the continued existence of a specific thing is essential to the performance of a contract, its destruction, from no default of either party, operates as a discharge.

(c) In case of incapacity for personal services, the rule being that a contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.²²⁴

Obvious physical impossibility, or legal impossibility, which is apparent upon the face of the promise, avoids the contract. There is no question of discharge, for there has in fact never been a contract. The reason for this is, as we have seen, that the promise is an unreal consideration for any promise given in return.²²⁵

Again, impossibility which arises from the nonexistence of the subject-matter of the contract avoids it.²²⁶ Here, also, there is no question of discharge from a contract. The question is one of avoidance of the contract, and relates to its formation.

We are here to deal with those cases in which a valid contract has been made, but has become impossible of performance because of facts and circumstances arising subsequent to its formation. The general rule is that such impossibility, even though it arises without any fault on the part of the promisor, does not discharge him from his liability under the contract. Of course he cannot perform his promise, as that has become impossible; but this is no excuse, and he may be held liable as for failure to perform. As we have seen in speaking of conditions subsequent, the promisor may, by the terms of the contract, make the performance of his promise conditional upon its continued possibility, and if he does so the promisee takes the risk, and must bear the loss if performance becomes impossible. If, however, the promisor makes his promise unconditionally, it is his own lookout, and he takes the risk of being held liable, even though performance becomes impossible by reason of circumstances beyond his control.²²⁷ "Where the contract is to do a thing which is possible

²²⁴ Anson, *Cont.* (4th Ed.) 320-325.

²²⁵ Ante, p. 134.

²²⁶ Ante, p. 201.

²²⁷ *Paradine v. Jane*, Aleyn, 26; *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Kearon v. Pearson*, 7 Hurl. & N. 386; *The Harriman*, 9 Wall. 161, 19 L. Ed. 629; *Jones v. U. S.*, 96 U. S. 24, 24 L. Ed. 644; *JACKSONVILLE, M., P. RY. & NAV. CO. v. HOOPER*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; *BEEBE v. JOHNSON*, 19 Wend. (N. Y.) 500, 32 Am. Dec. 518; *Harmony v.*

in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control." ²²⁸

In an old case, in which the plaintiff sued for rent due upon a lease, the defendant pleaded that a foreign prince had invaded the realm with a hostile army, and expelled defendant from the premises demised, whereby he could not take the profits out of which the rent should have come. The court held that this was no excuse, "and this difference was taken: that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. * * * But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might

Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Booth v. Mill Co., 60 N. Y. 487; STEES v. LEONARD, 20 Minn. 494 (Gil. 448); Harrison v. Railway Co., 74 Mo. 364, 41 Am. Rep. 318; School Dist. No. 1 v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371; Adams v. Nichols, 19 Pick. (Mass.) 275; Eugster v. West, 35 La. Ann. 119, 48 Am. Rep. 232; School Trustees v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373; SUMMERS v. HIBBARD, SPENCER, BARTLETT & CO., 153 Ill. 102, 38 N. E. 899, 46 Am. St. Rep. 872; Middlesex Water Co. v. Knappmann Whiting Co., 64 N. J. Law, 240, 45 Atl. 693, 49 L. R. A. 572, 81 Am. St. Rep. 467; Reichenbach v. Sage, 13 Wash. 364, 43 Pac. 354, 52 Am. St. Rep. 51. Where a person has contracted to build a house, he is neither excused from performance, nor entitled to recover for what he has done, by the fact that the house is destroyed by fire or other cause beyond his control, before its completion and acceptance by the owner. School Trustees v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373; Lawing v. Rintles, 97 N. C. 350, 2 S. E. 252; DERMOTT v. JONES, 2 Wall. 1, 17 L. Ed. 762; Fildew v. Besley, 42 Mich. 100, 3 N. W. 278, 36 Am. Rep. 433; Vogt v. Hecker (Wis.) 95 N. W. 90. Most courts hold that, where a person has agreed to make repairs or do other work on a specific building or chattel, its destruction before the work is finished will discharge the contract, and the workman may recover for what he has done, and it is immaterial that the work was only to be paid for on completion. See Whelan v. Clock Co., 97 N. Y. 293; Hindrey v. Williams, 9 Colo. 371, 12 Pac. 436; BUTTERFIELD v. BYRON, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; CLEARY v. SOHIER, 120 Mass. 210; Cook v. McCabe, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765; Lord v. Wheeler, 1 Gray (Mass.) 282; WELLS v. CALNAN, 107 Mass. 514, 9 Am. Rep. 65; Haynes v. Baptist Church, 88 Mo. 285, 57 Am. Rep. 413; Weis v. Devlin, 67 Tex. 507, 3 S. W. 726, 60 Am. Rep. 38; Hysell v. Manufacturing Co., 46 W. Va. 158, 33 S. E. 95; ANGUS v. SCULLY, 176 Mass. 357, 57 N. E. 674; 49 L. R. A. 562, 79 Am. St. Rep. 318; Hayes v. Gross, 9 App. Div. 12, 40 N. Y. Supp. 1098, affirmed, 162 N. Y. 610, 57 N. E. 1112. But see APPLEBY v. MYERS, L. R. 2 C. P. 651; BRUMBY v. SMITH, 3 Ala. 123; SIEGEL, COOPER & CO. v. EATON & PRINCE CO., 165 Ill. 550, 46 N. E. 449; Huyett & Smith Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 47 N. E. 384, 59 Am. St. Rep. 272.

²²⁸ Jones v. U. S., 96 U. S. 24, 24 L. Ed. 644.

have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." ²²⁹

Exceptions to the Rule.

The exceptions to the rule must be distinguished from the cases in which the act of God is said to excuse from nonperformance of a contract. There are, as we have seen, certain contracts into which the act of God is introduced as an express, or, by custom, an implied, condition subsequent absolving the promisor; but there are forms of impossibility which are said to excuse from performance because "they are not within the contract,"—that is to say, that neither party can reasonably be supposed to have contemplated their occurrence, so that the promisor neither accepts them specifically nor promises unconditionally in respect of them. ²³⁰

Same—Legal Impossibility.

Legal impossibility arising from a change in the law ²³¹ exonerates the promisor. ²³² It was so held in an action on a covenant in a lease from the defendant to the plaintiff, by which the defendant agreed that neither he "nor his assigns" would, during the term, erect any but ornamental buildings on adjoining land, which had been retained by the defendant, but which was afterwards taken by a railroad company under legislative authority, and used for the erection of a station. "The legislature," it was said, "by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind

²²⁹ *Paradine v. Jane*, Aleyn, 26.

²³⁰ *BAILY v. DE CRESPIGNY*, L. R. 4 Q. B., at page 185. If the impossibility is caused by the act of the promisor, it does not excuse failure to perform. Ante, p. 448. The exceptions do not apply where a person has an option to perform his contract in either of two ways, and it becomes impossible of performance in one of the ways only. In such a case he must perform in the other way. *State v. Worthington's Ex'rs*, 7 Ohio, 171, pt. 1; *DRAKE v. WHITE*, 117 Mass. 10; *Jacquinet v. Boutron*, 19 La. Ann. 30; *Board of Education v. Townsend*, 63 Ohio St. 514, 59 N. E. 223, 52 L. R. A. 868.

²³¹ Otherwise if impossibility is created by foreign law. *Bunker v. Hodgson*, 3 Maule & S. 267; *Tweedie Trading Co. v. James P. McDonald Co.* (D. C.) 114 Fed. 985. Cf. *O'Neil v. Armstrong* (1895) 2 Q. B. 70.

²³² *BAILY v. DE CRESPIGNY*, L. R. 4 Q. B. 180; *CORDES v. MILLER*, 39 Mich. 581, 33 Am. Rep. 430; *SEMMES v. INSURANCE CO.*, 13 Wall. 158, 20 L. Ed. 490; *Brick Presbyterian Church v. City of New York*, 5 Cow. (N. Y.) 538; *JONES v. JUDD*, 4 N. Y. 411; *Mississippi & T. R. Co. v. Green*, 9 Heisk. (Tenn.) 588. And see *Buffalo E. S. R. Co. v. Railroad Co.*, 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284. But there is no discharge when the law merely makes performance more burdensome, though not impossible. *Baker v. Johnson*, 42 N. Y. 126; *Newport News & M. V. Co. v. McDonald Brick Co.'s Assignee*, 109 Ky. 408, 59 S. W. 332.

of assign, such as was not in the contemplation of the parties when the contract was entered into. 'To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties.'²³³ This exception does not apply to the full extent where the impossibility created by a change in the law is only temporary. In such a case liability to perform is only suspended, and the promise must be performed when the impossibility ceases.²³⁴

Legal impossibility may arise as well by action of the courts or by the executive as of the legislature, and in all such cases the contract is discharged. Thus, where an agent was under employment by an insurance company, and before expiration of the term the company was enjoined from doing business, and a receiver was appointed, at the instance of the state, the contract was discharged.²³⁵ So, where a servant agreed with his master that if he left without giving two weeks' notice he should receive nothing for wages due, and was arrested and imprisoned for crime, it was held that he could nevertheless recover.²³⁶ And where performance of a charter party for loading a cargo at a foreign port was prevented by a declaration of war rendering performance impossible without illegal trading with the enemy, the contract was discharged.²³⁷

Same—Destruction of the Subject-Matter.

Where the continued existence of a specific thing is essential to the performance of the contract, its destruction from no fault of either party operates as a discharge.²³⁸ A leading case on this subject was one in which the defendant had agreed to let the plaintiff have the use of a music hall for the purpose of giving concerts upon certain days. Before the days of performance arrived the hall was destroyed by fire, and the plaintiff sued the defendant for losses arising from the consequent breach of contract. The court held that, in the absence of any express stipulation on the matter, the parties must be taken "to have contemplated the continuing existence as the foundation of what was to be done," and that, therefore, "in the absence of any

²³³ *BAILY v. DE CRESPIGNY*, L. R. 4 Q. B. 180.

²³⁴ *Hadley v. Clarke*, 8 Term. R. 259; *Baylies v. Fettyplace*, 7 Mass. 325.

²³⁵ *PEOPLE v. INSURANCE CO.*, 91 N. Y. 174. To the same effect, where performance is prevented by appointment of receiver and injunction. *Malcomson v. Wappoo Mills (C. C.)* 88 Fed. 680; *Burkhardt v. School Tpt.*, 9 S. D. 315, 69 N. W. 16. Contra, *Spader v. Manufacturing Co.*, 47 N. J. Eq. 18, 20 Atl. 378; *State v. Railroad Co.*, 61 Neb. 545, 85 N. W. 556.

²³⁶ *HUGHES v. WAMSUTTA MILLS*, 11 Alien (Mass.) 201. But see *Leopold v. Salkey*, 89 Ill. 412, 31 Am. Rep. 93.

²³⁷ *Esposito v. Bowden*, 7 El. & Bl. 763.

²³⁸ *TAYLOR v. CALDWELL*, 3 Best & S. 826; *LORD v. WHEELER*, 1 Gray (Mass.) 282; *Walker v. Tucker*, 70 Ill. 527; *The Tornado*, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747; *Ward v. Vance*, 93 Pa. 499. Cf. *Nicol v. Fitch*, 115 Mich. 15, 72 N. W. 988, 69 Am. St. Rep. 542.

expressed or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."²³⁹ Accordingly, where the contract is for the sale of specific goods, which perish without the seller's fault before the day appointed for delivery, the seller is excused from his obligation to deliver, and the buyer from his obligation to pay.²⁴⁰

Same—Incapacity for Personal Services.

A contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.²⁴¹ In an action for damage sustained by a breach of contract on the part of a musician, who, having promised to perform at a concert, was prevented from doing so by a dangerous illness, the law governing the case was thus stated: "This is a contract to perform

²³⁹ TAYLOR v. CALDWELL, 3 Best & S. 826.

²⁴⁰ Rugg v. Minett, 11 East, 210; HOWELL v. COUPLAND, 1 Q. B. Div. 258; DEXTER v. NORTON, 47 N. Y. 62, 7 Am. Rep. 415; Thompson v. Gould, 20 Pick. (Mass.) 134, 139; WELLS v. CALNAN, 107 Mass. 514, 9 Am. Rep. 65; Gould v. Murch, 70 Me. 288, 35 Am. Rep. 325; McMillan v. Fox, 90 Wis. 173, 62 N. W. 1052. So where goods are to be manufactured in particular factory, which is destroyed. STEWART v. STONE, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215. Or a crop is to be grown on a particular piece of land, and the crop fails. HOWELL v. COUPLAND, 1 Q. B. Div. 258. Otherwise where no particular land is specified. ANDERSON v. MAY, 50 Minn. 280, 52 N. W. 530, 17 L. R. A. 555, 36 Am. St. Rep. 642.

²⁴¹ Boast v. Firth, L. R. 4 C. P. 1; Underwood v. Lewis [1894] 2 Q. B. 306; SPALDING v. ROSA, 71 N. Y. 40, 27 Am. Rep. 7; Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57; LAKEMAN v. POLLARD, 43 Me. 463, 69 Am. Dec. 77; Shultz v. Johnson's Adm'r. 5 B. Mon. (Ky.) 497; Harrington v. Iron-Works Co., 119 Mass. 82; Fuller v. Brown, 11 Mete. (Mass.) 440; SCULLY v. KIRKPATRICK, 79 Pa. 324, 21 Am. Rep. 62; Allen v. Baker, 86 N. C. 91, 40 Am. Rep. 444; Hubbard v. Belden, 27 Vt. 645; Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370; Smith v. Preston's Estate, 170 Ill. 179, 48 N. E. 688; Blakely v. Sousa, 197 Pa. 305, 47 Atl. 286, 80 Am. St. Rep. 821; Walsh v. Fisher, 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865 (violence of strikers); Dow v. Bank, 88 Minn. 355, 93 N. W. 121. So the death of the employer discharges the employe from performance, Farrow v. Wilson, L. R. 4 C. P. 589; YERRINGTON v. GREENE, 7 R. I. 589, 84 Am. Dec. 578, but not necessarily the death of one of two joint employers. Martin v. Hunt, 1 Allen (Mass.) 419; Hughes v. Gross, 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. Rep. 375. But the death of one member of a law firm which has contracted to conduct a case terminates the contract, the employment being personal. Wright v. McCampbell, 75 Tex. 644, 13 S. W. 293; Landa v. Shook, 87 Tex. 608, 30 S. W. 536; Baxter v. Billings, 83 Fed. 790, 28 C. C. A. 85. See, also, Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180; Salisbury v. Brisbane, 61 N. Y. 617; Martine v. Insurance Soc., 53 N. Y. 339, 13 Am. Rep. 529.

a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that by virtue of the terms of the original bargain incapacity of body or mind in the performer, without default on his or her part, is an excuse for nonperformance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so, and, as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional, and not absolute."²⁴²

On the same principle it has been held that where, from the prevalence of a contagious and fatal disease in the vicinity of the place where one has contracted to labor for a specified time, the danger is such as to render it unsafe and unreasonable for men of ordinary care and common prudence to remain there, it is a sufficient cause for not fulfilling the contract.²⁴³ The rule that the death of a person discharges his contract to render personal services has been held not to apply where the services are of such a character that they may be just as well performed by his personal representative.²⁴⁴ Where performance is thus rendered impossible by death or incapacity, the contractor or his personal representative may recover upon a quantum meruit, subject to the right of the defendant to have the recovery reduced by the amount of any loss which he may have suffered from nonperformance of the contract.²⁴⁵

Same—Performance Prevented by the Promisee.

If performance of a promise is prevented by the promisee, there is no breach of contract by the promisor.²⁴⁶

²⁴² Robinson v. Davison, L. R. 6 Exch. 269.

²⁴³ LAKEMAN v. POLLARD, 43 Me. 463, 69 Am. Dec. 77. But see DEWEY v. SCHOOL DIST., 43 Mich. 480, 5 N. W. 646, 38 Am. Rep. 206.

²⁴⁴ Hawkins v. Ball's Adm'r, 18 B. Mon. (Ky.) 816, 68 Am. Dec. 755; Siler v. Gray, 86 N. C. 566; Janin v. Browne, 59 Cal. 37; Billing's Appeal, 106 Pa. 558; Howe Sewing-Mach. Co. v. Rosensteel (C. C.) 24 Fed. 583; Shultz v. Johnson's Adm'r, 5 B. Mon. (Ky.) 497; Volk v. Stowell, 98 Wis. 385, 74 N. W. 118.

²⁴⁵ Patrick v. Putnam, 27 Vt. 759; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 388; LAKEMAN v. POLLARD, 43 Me. 463, 69 Am. Dec. 77; Green v. Gilbert, 21 Wis. 395; Parker v. Macomber, 17 R. I. 674, 24 Atl. 464, 16 L. R. A. 858. The right to recover except on full performance may be excluded by the express terms of the contract. CUTTER v. POWELL, 6 Term R. 320.

²⁴⁶ Black v. Woodrow, 39 Md. 194; Smith v. Alker, 102 N. Y. 87, 5 N. E. 791; ante, p. 468.

DISCHARGE BY OPERATION OF LAW.

251. There are rules of law which, operating upon certain sets of circumstances, will bring about the discharge of a contract; as in case of

- (a) Merger.**
- (b) Alteration of a written instrument.**
- (c) Proceedings in bankruptcy.**

SAME—MERGER.

252. Acceptance of a higher security in the place of a lower merges or extinguishes the lower, but

- (a) The two securities must be different in their legal operation, the one of a higher efficacy than the other.**
- (b) The subject-matter of the two securities must be identical.**
- (c) The parties must be the same.**

The merger of a lower in a higher security does not depend on the intention of the parties. The mere acceptance of the higher security ipso facto extinguishes the lower.²⁴⁷ We shall presently see an instance of this form of discharge in the case of a judgment recovered in an action for breach of contract. The judgment extinguishes by merger the right of action arising from the breach. In like manner, if the parties to a simple contract embody its contents in a deed which they both execute, the simple contract is discharged.²⁴⁸ In order to effect a merger, the two securities must be different in their legal operation, the one of a higher efficacy than the other. A second security, taken in addition to one similar in character, will not affect its validity unless there be a discharge by substituted agreement.²⁴⁹ It is also necessary that the subject-matter of the two securities shall be identical,²⁵⁰ and that the parties shall be the same.²⁵¹ Even a security

²⁴⁷ *Price v. Moulton*, 10 C. B. 561; *Jones v. Johnson*, 3 Watts & S. (Pa.) 276, 38 Am. Dec. 760; *Moale v. Hollins*, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; *Keefer v. Zimmerman*, 22 Md. 274; *Wann v. McNulty*, 2 Gilman, 355, 43 Am. Dec. 58; ante, p. 58.

²⁴⁸ *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181; *Howes v. Barker*, 3 Johns. (N. Y.) 506, 3 Am. Dec. 526; *CLIFTON v. IRON CO.*, 74 Mich. 183, 41 N. W. 891, 16 Am. St. Rep. 621; *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917.

²⁴⁹ *HIGGEN'S CASE*, 6 Coke, 45b; *Andrews v. Smith*, 9 Wend. (N. Y.) 53; *Gregory v. Thomas*, 20 Wend. (N. Y.) 17; *Bill v. Porter*, 9 Conn. 23; ante, pp. 58, 435.

²⁵⁰ *Holmes v. Bell*, 3 Man. & G. 213; *Witbeck v. Waine*, 16 N. Y. 532.

²⁵¹ *Hooper's Case*, 2 Leon. 110; *Banorgree v. Hovey*, 5 Mass. 11, 4 Am. Dec. 17; *Doty v. Martin*, 32 Mich. 462.

of a higher nature, if it is taken expressly as a collateral security, will not extinguish the inferior.²⁵²

It is often said that where a simple oral contract is reduced to writing the written contract merges the oral agreement, but the term "merger" is thus used in a different sense. A simple contract in writing is of no higher nature than a simple contract by word of mouth. What is meant is simply that where the parties have reduced their contract to writing they cannot vary or add to it by parol evidence. It is simply a question of evidence.²⁵³ Again, one simple contract may be substituted for another. In such case, however, there is no discharge by operation of law, but the substitution depends upon the intention of the parties.²⁵⁴

SAME—ALTERATION OF A WRITTEN INSTRUMENT.

253. If a deed or contract in writing is altered by addition or erasure, it is discharged, provided the alteration is made—

- (a) **In a material part, so that it changes the legal effect of the instrument. It need not necessarily be prejudicial.**
- (b) **By a party to the contract, or by a stranger with his consent.**
- (c) **Intentionally.**
- (d) **Without the consent of the other party.**

The alteration of a deed, or of a simple contract in writing, if made under the circumstances stated above, will operate as a discharge of the contract, the law imposing this severe penalty as a safeguard against tampering with written instruments.²⁵⁵ The alteration,

²⁵² *Day v. Leal*, 14 Johns. (N. Y.) 404; *Butler v. Miller*, 1 Denio (N. Y.) 407. And see the cases cited in the preceding note. Ante, p. 58, note 48.

²⁵³ Ante, p. 386.

²⁵⁴ 9 Cyc. Law & Proc. 635, ante, p. 58.

²⁵⁵ *Suffell v. Bank*, 9 Q. B. Div. 555; *Wood v. Steele*, 6 Wall. 80, 18 L. Ed. 725; *Angle v. Insurance Co.*, 92 U. S. 330, 23 L. Ed. 556; *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed. 641; *Osgood v. Stevenson*, 143 Mass. 399, 9 N. E. 825; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92; *Neff v. Horner*, 63 Pa. 327, 3 Am. Rep. 555; *Kilkelly v. Martin*, 34 Wis. 525; *Montag v. Linn*, 23 Ill. 551; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Marsh v. Griffin*, 42 Iowa, 403; *Aetna Nat. Bank v. Winchester*, 43 Conn. 391; *Morrison v. Garth*, 78 Mo. 434; *Johnson v. Moore*, 33 Kan. 90, 5 Pac. 406. Alteration nullifies a negotiable instrument even against a bona fide purchaser. *Master v. Miller*, 4 T. R. 320; *Burchfield v. Moore*, 3 El. & Bl. 683; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110; *Horn v. Bank*, 32 Kan. 518, 4 Pac. 1022; *Gettysburg Nat. Bank v. Chisholm*, 169 Pa. 564, 32 Atl. 730, 47 Am. St. Rep. 929; *Exchange Nat. Bank v. Bank*, 58 Fed. 140, 7 C. C. A. 111, 22 L. R. A. 686; *Seebolt v. Tatlie*, 76 Minn. 131, 78 N. W. 967. This rule has been changed in many states by the Negotiable Instruments Law. Norton, Bills & N. (3d Ed.) 246.

to have this effect, must be material; that is, it must change the legal effect of the instrument.²⁵⁹ Whether it is material or not must, of course, depend upon the character of the instrument. Adding words of negotiability to a note or changing or cutting from a note a memorandum limiting its effect as a negotiable instrument or otherwise,²⁵⁷ or in any way altering it so as to destroy or change its negotiability;²⁵⁸ under some circumstances, adding a seal to an instrument, or effacing a seal,²⁵⁹ changing the date of a note or other security,²⁶⁰ or the time of payment,²⁶¹ or the place of payment,²⁶² or the amount to be

²⁵⁶ *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600 (collecting cases); *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Birdsall v. Russell*, 29 N. Y. 220; *Manufacturers' Bank v. Follett*, 11 R. I. 92; *Wessell v. Glenn*, 108 Pa. 104; *Miller v. Reed*, 27 Pa. 244, 67 Am. Dec. 459; *Palmer v. Largent*, 5 Neb. 223; *Leonard v. Phillips*, 39 Mich. 182, 33 Am. Rep. 370. Filling blanks with name of party, or more specific description of property, will not avoid contract, since it does not change legal effect. *Briscoe v. Reynolds*, 51 Iowa, 673, 2 N. W. 529; *Rowley v. Jewett*, 56 Iowa, 492, 9 N. W. 353. Figures in margin being no part of the note, their alteration is immaterial. *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39. It has been held in England that, though in a bank note the promise to pay made by the bank is not touched by an alteration in the number of the note, the fact that a bank note is a part of the currency, and that the number placed on it is put to important uses by the bank and by the public for the detection of forgery and theft, causes an alteration in the number to be material, and to invalidate the note. *Suffell v. Bank*, 9 Q. B. Div. 555. Contra, as to bonds. *Birdsall v. Russell*, 29 N. Y. 220; *City of Elizabeth v. Force*, 29 N. J. Eq. 587.

²⁵⁷ *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Gerrish v. Glines*, 56 N. H. 9; *Johnson v. Heagan*, 23 Me. 329; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; *Cochran v. Nebeker*, 48 Ind. 459; *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523; *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382.

²⁵⁸ *Booth v. Powers*, 56 N. Y. 22; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Needles v. Shaffer*, 60 Iowa, 65, 14 N. W. 129; *Belknap v. Bank*, 100 Mass. 376, 97 Am. Dec. 105.

²⁵⁹ *Davidson v. Cooper*, 11 Mees. & W. 778, 13 Mees. & W. 343; *Rawson v. Davidson*, 49 Mich. 607, 14 N. W. 565. Under some circumstances and in some jurisdictions, the seal may make no difference. *Truett v. Wainwright*, 4 Gilman (Ill.) 411; *White v. Fox*, 29 Conn. 570.

²⁶⁰ *Wood v. Steele*, 6 Wall. 80, 18 L. Ed. 725; *Vance v. Lowther*, 1 Exch. Div. 176; *Walton v. Hastings*, 4 Camp. 223; *Outhwaite v. Luntley*, Id. 179; *Hamilton v. Wood*, 70 Ind. 306; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Crawford v. Bank*, 100 N. Y. 50, 2 N. E. 881; *Miller v. Gilleland*, 19 Pa. 119.

²⁶¹ *Lee v. Murdock*, 4 Pat. App. 261; *Alderson v. Langdale*, 3 Barn. & Adol. 660; *Lewis v. Kramer*, 3 Md. 265; *Benedict v. Miner*, 58 Ill. 19; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528; *Seebold v. Tattlie*, 76 Minn. 131, 78 N. W. 967.

²⁶² *Woodworth v. Bank*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; *Whitesides v. Bank*, 10 Bush (Ky.) 501, 19 Am. Rep. 74; *Charlton v. Reed*, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808; *Townsend v. Wagon Co.*, 10 Neb. 615, 7 N. W. 274, 35 Am. Rep. 493; *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 549.

paid, either by lessening or increasing the principal,²⁶³ or by changing the rate of interest, or adding a provision for interest;²⁶⁴ adding to or withdrawing from an instrument the name of a maker, drawer, or, according to some of the cases, a surety, after the instrument has been executed,²⁶⁵—are all material alterations. But “an alteration which only does what the law would do—that is, only expresses what the law implies—is not a material alteration, and therefore would not avoid an instrument.”²⁶⁶ It is possible for the character of an instrument to be affected by an alteration which does not touch the contractual rights set forth in it. If, for instance, after the execution and delivery of an unattested bond, the obligee should fraudulently, and with a view to some improper advantage, procure a person who was not present at the execution of the instrument to sign his name thereto as an attesting witness, the obligor would be discharged.²⁶⁷ The alter-

²⁶³ *Goodman v. Eastman*, 4 N. H. 455; *Bank of Commerce v. Bank*, 3 N. Y. 230. Or by altering currency in which note is payable. *Darwin v. Rippey*, 63 N. C. 318; *Martendale v. Follett*, 1 N. H. 95; *Schwalm v. McIntyre*, 17 Wis. 232.

²⁶⁴ *Warrington v. Early*, 2 El. & Bl. 763; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274; *Benedict v. Miner*, 58 Ill. 19; *Ivory v. Michael*, 33 Mo. 398; *Lee v. Starbird*, 55 Me. 491; *Woodworth v. Anderson*, 63 Iowa, 503, 19 N. W. 296; *Kilkelly v. Martin*, 34 Wis. 525; *Neff v. Horner*, 63 Pa. 327, 3 Am. Rep. 555; *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Coburn v. Webb*, 56 Ind. 96; *Fay v. Smith*, 1 Allen (Mass.) 477, 79 Am. Dec. 752.

²⁶⁵ *Bank of Limestone v. Penick*, 5 T. B. Mon. (Ky.) 25; *Pulliam v. Withers*, 8 Dana (Ky.) 98, 33 Am. Dec. 479; *Martin v. Thomas*, 24 How. 315, 16 L. Ed. 689; *Gardner v. Walsh*, 32 Eng. Law & Eq. 162; *Smith v. United States*, 2 Wall. 219, 8 L. Ed. 130; *Henry v. Coats*, 17 Ind. 161; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Sullivan v. Rudisill*, 63 Iowa, 158, 18 N. W. 856; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229. It seems, however, according to the weight of authority in this country, that the addition of the signature of a surety or guarantor, not a joint maker (but see *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 341), does not discharge the maker of a note. *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed. 641; *Stone v. White*, 8 Gray (Mass.) 589; *McCaughy v. Smith*, 27 N. Y. 39; *Montgomery R. Co. v. Hurst*, 9 Ala. 518; *Wallace v. Jewell*, 21 Ohio St. 172, 8 Am. Rep. 48; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306. And it has been held that obtaining signature of second surety does not discharge first surety. *Ward v. Hackett*, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187; *Keith v. Goodwin*, 31 Vt. 268, 73 Am. Dec. 345; *Sampson v. Barnard*, 98 Mass. 359. Changing indorser into guarantor is material. *Belden v. Hann*, 61 Iowa, 42, 15 N. W. 591.

²⁶⁶ 2 Pars. Cont. 720; *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Brown v. Pinkham*, 18 Pick. (Mass.) 172; *Rudesill v. Jefferson Co. Court*, 85 Ill. 446; *Houghton v. Francis*, 29 Ill. 244; *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309.

²⁶⁷ *Adams v. Frye*, 3 Mete. (Mass.) 103; *Marshall v. Gougler*, 10 Serg. & R. (Pa.) 164. So of promissory note. *Brackett v. Mountfort*, 12 Me. 72;

ation is material in that it might allow proof of the execution of the bond by proving such person's handwriting.²⁶⁸

"It is not to the point that the alteration be or be not to the prejudice of the party against whom the liability is sought to be enforced. The courts will not sit in judgment upon the question whether it be to the prejudice of the party aggrieved or not."²⁶⁹

By Whom.

It was at one time held in England that any material alteration by a stranger would discharge the contract, and even now it seems to be there held that such an alteration will operate as a discharge, if it was made for the benefit of a party to the contract, and while the instrument was in the party's possession, whether the party knew of or consented to the alteration or not.²⁷⁰ The doctrine is not recognized to any extent, if at all, in this country. On the contrary, it is held that alteration by a stranger, without the knowledge or consent of the parties, is a mere spoliation, and does not discharge the contract.²⁷¹

Intent.

The alteration, to effect a discharge, must be intentional. An alteration by accident or mistake, occurring under such circumstances as to negative the idea of intention, will not invalidate the document.²⁷² Though there are some cases to the contrary, by the weight of authority, in so far as the instrument itself is concerned, it is immaterial whether the alteration was with fraudulent intent or not. Innocent

Thornton v. Appleton, 29 Me. 298; Homer v. Wallis, 11 Mass. 310, 6 Am. Dec. 169; Smith v. Dunham, 8 Pick. (Mass.) 246. Contra in case of note. Fuller v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600 (distinguishing some of cases above cited).

²⁶⁸ Ante, p. 388.

²⁶⁹ Norton, Bills & N. (3d Ed.) 252; Chappell v. Spencer, 23 Barb. (N. Y.) 584; Gardner v. Walsh, 5 El. & Bl. 83; Martin v. Thomas, 24 How. 315, 16 L. Ed. 689; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15.

²⁷⁰ Anson. Cont. (4th Ed.) 327; PIGOT'S CASE, 11 Rep. 27; DAVIDSON v. COOPER, 11 Mees. & W. 778, 13 Mees. & W. 343.

²⁷¹ Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Martin v. Insurance Co., 101 N. Y. 498, 5 N. E. 338; United States v. Spalding, 2 Mason, 478, Fed. Cas. No. 16,365; Yeager v. Musgrave, 28 W. Va. 90; Drum v. Drum, 133 Mass. 566; Church v. Fowle, 142 Mass. 12, 6 N. E. 764; Nichols v. Johnson, 10 Conn. 192; Bigelow v. Stilphen, 35 Vt. 521; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555; Wickes' Lessee v. Caulk, 5 Har. & J. (Md.) 36; Condict v. Flower, 106 Ill. 105; Hunt v. Gray, 35 N. J. Law, 227, 10 Am. Rep. 232; Piersol v. Grimes, 30 Ind. 129, 95 Am. Dec. 673; Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418; Moore v. Ivers, 83 Mo. 29; Andrews v. Calloway, 50 Ark. 358, 7 S. W. 449; Fullerton v. Sturges, 4 Ohio St. 530; White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313.

²⁷² WILKINSON v. JOHNSON, 3 Barn. & C. 428; Raper v. Birkback, 15 East, 17; Horst v. Wagner, 43 Iowa, 373, 22 Am. Rep. 255; Van Brunt v. Eoff, 35 Barb. (N. Y.) 501; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555.

but intentional alteration destroys its efficacy. An alteration, however, without fraudulent intent, will not prevent recovery on the original consideration for the instrument. Where a bill, note, or other security is given for a valuable consideration existing independently of the instrument, it is generally held that an alteration of the note or bill in a material part by the holder without authority of the maker prevents a recovery upon the instrument, whether the alteration was with or without fraudulent intent.²⁷³ If the alteration was made with fraudulent intent, there can be no recovery, even on the original consideration;²⁷⁴ but recovery on the original consideration may be had if the alteration was innocent.²⁷⁵

Consent.

If the alteration is with the consent of the party claiming a discharge, or if it is afterwards ratified by him, there is no discharge.²⁷⁶ It follows that where there are several promisors or obligors, and some

²⁷³ *Alderson v. Langdale*, 3 Barn. & Adol. 660; *Heath v. Blake*, 28 S. C. 406, 5 S. E. 842; *Wood v. Steele*, 6 Wall. 80, 18 L. Ed. 725; *Adams v. Frye*, 3 Mete. (Mass.) 103; *Eckhart v. Pickel*, 59 Iowa, 545, 13 N. W. 708. Contra, *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501; *Footte v. Hambriek*, 70 Miss. 157, 11 South. 567, 35 Am. St. Rep. 631; *Wallace v. Tice*, 32 Or. 421, 51 Pac. 733. Signing as attesting witness. *Thornton v. Appleton*, 29 Me. 298; *Milberry v. Storer*, 75 Me. 69, 46 Am. Rep. 361.

²⁷⁴ *Meyer v. Huneke*, 55 N. Y. 412; *SMITH v. MACE*, 44 N. H. 553; *Warder, Bushnell & Glessner Co. v. Willyard*, 46 Minn. 531, 49 N. W. 300, 13 L. R. A. 596, 24 Am. St. Rep. 246; *Ballard v. Insurance Co.*, 81 Ind. 239; *Walton Plow Co. v. Campbell*, 35 Neb. 174, 52 N. W. 883, 16 L. R. A. 468; *Hunt v. Gray*, 35 N. J. Law, 227, 10 Am. Rep. 232; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Maguire v. Eichmeier*, 109 Iowa, 301, 80 N. W. 395.

²⁷⁵ *Sloman v. Cox*, 1 Crompt. M. & R. 471; *Hunt v. Gray*, 35 N. J. Law, 227, 10 Am. Rep. 232; *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766; *Sullivan v. Rudisill*, 63 Iowa, 158, 18 N. W. 856; *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446; *Gorden v. Robertson*, 48 Wis. 493, 4 N. W. 579; *Savage v. Savage*, 36 Or. 268, 59 Pac. 461.

²⁷⁶ *Stoddard v. Penniman*, 113 Mass. 386; *Commercial Bank v. Warren*, 15 N. Y. 577; *Booth v. Powers*, 56 N. Y. 22; *Stiles v. Probst*, 69 Ill. 382; *Hanson v. Crawley*, 41 Ga. 303; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389; *MERRAVEN v. CRISLER*, 53 Miss. 542; *National State Bank v. Rising*, 4 Hun (N. Y.) 793; *Duker v. Franz*, 7 Bush (Ky.) 273, 3 Am. Rep. 314; *Speake v. United States*, 9 Cranch, 28, 3 L. Ed. 645; *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 632; *Jackson v. Johnson*, 67 Ga. 167; *Canon v. Grigsby*, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; *Payne v. Long*, 121 Ala. 385, 25 South. 780. An instrument is not avoided by inserting a provision for interest at the rate it was intended to bear. *First Nat. Bank v. Carson*, 60 Mich. 432, 27 N. W. 589; nor by filling blanks with names of parties, place of payment, or otherwise, as intended by the parties. *Briscoe v. Reynolds*, 51 Iowa, 673, 2 N. W. 529; *Gillaspie v. Kelly*, 41 Ind. 158, 13 Am. Rep. 318; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; *Witte v. Williams*, 8 S. C. 290, 28 Am. Rep. 294.

consent, those so consenting remain bound, but those who do not consent are discharged.²⁷⁷

Loss of Instrument.

The loss of an instrument only affects the rights of the parties in so far as it occasions a difficulty of proof, except that, in case of the loss of a negotiable instrument, the holder, if he loses it, loses his rights under it, unless he offer to the party primarily liable upon it an indemnity against possible claims.²⁷⁸

SAME—BANKRUPTCY.

- 254. Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the court an order of discharge.**

Discharge by bankruptcy proceedings is statutory, and need not be further mentioned.

REMEDIES ON BREACH OF CONTRACT.

- 255. Where a contract is broken by one of the parties, the other party acquires, or may acquire, three distinct rights:**

- (a) **He may be discharged from further performance.**
- (b) **If he has done anything under the contract, he has a right to sue on the quantum meruit, a cause of action distinct from that arising out of the original contract, and based upon a contract created by law.**
- (c) **He has a right of action on the original contract, or term of the contract broken, and may maintain:**
 - (1) **A suit to obtain damages for the loss sustained by the breach.**
 - (2) **A suit to obtain specific performance of the contract by the other party.**²⁷⁹

We have seen that if a contract is discharged by the breach the party injured is exonerated from further performance, provided he treats the breach as a discharge. Where he relies on a discharge, his remedy is by setting up his discharge as a defense in an action brought by the other party on the contract. In addition to his right to a discharge from performance, he has a right, if he has done any-

²⁷⁷ *Gardiner v. Harbeck*, 21 Ill. 128; *Myers v. Nell*, 84 Pa. 369; *State v. Van Pelt*, 1 Ind. 304; *Warring v. Williams*, 8 Pick. (Mass.) 322; *Davis v. Bauer*, 41 Ohio St. 257; *Bell v. Mahin*, 69 Iowa, 408, 29 N. W. 331.

²⁷⁸ *Hansard v. Robinsen*, 7 Barn. & C. 90; *Condlans Quarry Co. v. Parker*, L. R. 3 C. P. 1.

²⁷⁹ *Anson, Cont.* (4th Ed.) 308, 309.

thing under the contract, to sue on the quantum meruit for compensation for his partial performance.²⁸⁰ This cause of action is distinct from that arising out of the original contract. It is based upon a new contract, generally called an implied contract, but really a quasi contract, or contract created by law, because of the receipt by the other party of the benefits of such performance. In addition to these rights, the party so injured by a breach has a right of action based upon the original contract or term of the contract broken. This remedy exists not only where he is discharged by the breach, but also where he is not discharged, or where, though he was entitled to claim a discharge, he has preferred to waive such right, and go on with the contract. His remedy in this case is of two kinds: (1) He may seek, in a court of law, to obtain damages for the loss he has sustained by himself taking the initiative and bringing an action for damages, or by waiting until the other party sues him, and then asserting his right by way of recoupment, counterclaim, or cross action. He may resort to this remedy whether he claims a discharge by reason of the other's breach or not. (2) He may, in the case of certain contracts and under special circumstances, obtain specific performance of the contract by the other party, by bringing a suit in equity for that purpose. Of course he would not be entitled to such performance unless he performed the contract on his part, or offered to perform it, and therefore he cannot resort to this remedy where he claims a discharge from further performance.

We shall only treat of these two remedies in the most general way, and give briefly some of the elementary rules, for they do not properly come within the scope of our work.

SAME—DAMAGES.²⁸¹

256. Every breach of contract entitles the party injured to sue for damages.

257. The rule as to the measure of damages is that the plaintiff is, so far as money can do it, to be placed in the same situation as if the contract had been performed. If he has suffered no actual loss, he is entitled to nominal damages. But—

LIMITATION OF RULE—The damages recoverable are only such as might have been supposed by the parties to be the natural result of the breach.

²⁸⁰ Ante, p. 468; Phillips v. Wiginton, 1 Ad. & E. 333; PRICKETT v. BADGER, 1 C. B. (N. S.) 296; Howard v. Daly, 61 N. Y. 362, 369, 19 Am. Rep. 285; DERBY v. JOHNSON, 21 Vt. 17; Brinkley v. Swiegood, 65 N. C. 626; Britt v. Hays, 21 Ga. 157; Urquhart v. Mortgage Co., 85 Minn. 69, 88 N. W. 264. See, also, ante, p. 471.

²⁸¹ See Anson, Cont. (4th Ed.) 309-312.

258. The parties may assess the damages themselves by provision in the contract, but they cannot provide for a penalty.

259. Damages are by way of compensation, and not of punishment, and, as a rule, only the pecuniary loss can be recovered; but—
EXCEPTION—There is an exception in case of the breach of a promise to marry.

The damages awarded for a breach of contract should represent the loss actually sustained, the rule of the common law being, as stated above, that a party who has been injured by a breach of contract "is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."²⁸² Every breach of contract gives the injured party a right of action, and the right to a verdict in his favor; but, if no actual loss at all accrues from the breach, he is only entitled to nominal damages,—that is, "a sum of money that may be spoken of, but that has no existence in point of quantity."²⁸³

Remote and Proximate.

The rule just stated is subject to the limitation that only such damages can be recovered as can be deemed to have been in the contemplation of the parties. The breach of a contract may result in losses which neither party contemplated or could contemplate at the time the contract was entered into, and the courts have striven to lay down rules by which the limit of damages may be ascertained. The limit must depend upon the nature of the particular contract, and only the most general rules can be laid down. It is said that "the damages to which the plaintiff is entitled are such as might have been supposed by the parties to be the natural result of a breach of the contract; such as might have been in their contemplation when the contract was made."²⁸⁴ Any special loss which might accrue from a breach of contract, but which would not naturally and obviously flow therefrom, must, to be recoverable, be expressly provided for in making the contract. In a leading case,²⁸⁵ the rules were thus stated: That where a party has broken his contract the damages which the other party should recover should be (1) such as may fairly and reasonably be considered to arise naturally—that is, according to the usual course

²⁸² Per Parke, B., in *ROBINSON v. HARMAN*, 1 Exch. 855. And see *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Cutting v. Railway Co.*, 13 Allen (Mass.) 381; *Croucher v. Oakman*, 3 Allen (Mass.) 185.

²⁸³ Per Maule, J., in *BEAUMONT v. GREATHEAD*, 2 C. B. 494. And see *Excelsior Needle Co. v. Smith*, 61 Conn. 56, 23 Atl. 693; *Horton v. Bauer*, 129 N. Y. 148, 29 N. E. 1; *Watts v. Weston*, 62 Fed. 136, 10 C. C. A. 302; *BARNES v. BROWN*, 130 N. Y. 372, 29 N. E. 760; *Weber v. Squier*, 51 Mo. App. 601.

²⁸⁴ *Anson*, Cont. (4th Ed.) 310; *HADLEY v. BAXENDALE*, 9 Exch. 341; *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85.

²⁸⁵ *HADLEY v. BAXENDALE*, 9 Exch. 341.

of things—from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of its breach;²⁸⁶ that (2) if the damages arose out of special circumstances, communicated and so known to both parties when the contract was made, the damages which the parties would reasonably contemplate would be the amount of injury which would ordinarily follow from the breach of a contract under those special circumstances so known and communicated;²⁸⁷ but (3) if the special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any such special circumstances.²⁸⁸

Vindictive, Punitive, or Exemplary Damages.

Damages in an action for breach of contract are by way of compensation for the loss sustained by the breach, and never by way of punishment; and the plaintiff, therefore, cannot recover more than his pecuniary loss. This is the general rule, but it is subject to an exception in case of a breach of promise of marriage. In such a case, if the

²⁸⁶ *Cutting v. Railway Co.*, 13 Allen (Mass.) 381; *Clark v. Moore*, 3 Mich. 63; *Carnegie v. Holt*, 99 Mich. 606, 58 N. W. 623; *Booth v. Mill Co.*, 60 N. Y. 487; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Swain v. Schieffelin*, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385; *Blagen v. Thompson*, 23 Or. 239, 31 Pac. 647, 18 L. R. A. 315; *Fleming v. Beck*, 48 Pa. 309; *True v. Telegraph Co.*, 60 Me. 9, 11 Am. Rep. 156; *Hurd v. Dunsmore*, 63 N. H. 171.

²⁸⁷ *Smeed v. Foord*, 1 El. & El. 602; *Booth v. Mill Co.*, 60 N. Y. 487; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129; *Shepard v. Gaslight Co.*, 15 Wis. 318, 82 Am. Dec. 679; *King v. Woodbridge*, 34 Vt. 565; *Smith v. Railroad Co.*, 12 Allen (Mass.) 531, 90 Am. Dec. 166; *Illinois Cent. R. Co. v. Cobb*, 64 Ill. 128; *Watson v. Inhabitants of Needham*, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287. Mere communication of special circumstances is not enough unless given under such circumstances as reasonably to imply that it formed the basis of the agreement; that is, unless the circumstances were such that it might be supposed that a reasonable man would have had them in contemplation as a probable result of a breach. *British Columbia & Vancouver's Island Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499; *Horne v. Railway*, 7 C. P. 583, 591; *Booth v. Mill Co.*, 60 N. Y., at page 496; *Bridges v. Stickney*, 38 Me. 361; *McKinnon v. McEwan*, 48 Mich. 106, 11 N. W. 828, 42 Am. Rep. 464; *Snell v. Cottingham*, 72 Ill. 161; *Friend & T. Lumber Co. v. Miller*, 67 Cal. 464, 8 Pac. 40.

²⁸⁸ *Cory v. Ship Bldg. Co.*, L. R. 3 Q. B. 181; *British Columbia & Vancouver's Island Spar, Lumber & Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499; *Bartlett v. Blanchard*, 13 Gray (Mass.) 429; *Billmeyer v. Wagner*, 91 Pa. 92; *Paine v. Sherwood*, 19 Minn. 315 (Gil. 270); *Mihills Mfg. Co. v. Day*, 50 Iowa, 250; *Peace River Phosphate Co. v. Grafflin (C. C.)* 58 Fed. 550; *ROCHESTER LANTERN CO. v. PRESS CO.*, 135 N. Y. 209, 31 N. E. 1018; *Thomas, B. & W. Mfg. Co. v. Railway Co.*, 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725; *Buffalo Barb-Wire Co. v. Phillips*, 64 Wis. 338, 25 N. W. 208.

promise was broken abruptly, and under humiliating circumstances, or if the defendant acted maliciously and in a way to injure the plaintiff's character, exemplary damages may be recovered.²⁸⁹

Assessment by the Parties.

The parties to a contract frequently assess the damages at which they rate a breach of the contract by one or both of them, and introduce their assessment into the terms of the contract. They have the right to do this, but, as we have already seen, they cannot provide for a penalty to be paid by the one who shall break the contract.²⁹⁰

Difficulties in Assessment—Speculative Damages.

The mere fact that the ascertainment of the damages is difficult cannot deprive him of his right to whatever damages he has suffered as the natural consequence of the breach; the difficulty, when it arises, must be met by the jury. Thus, where a manufacturer, who was in the habit of sending his goods for exhibition to agricultural shows, and made a profit by the practice, intrusted goods to a carrier to be sent to a show, under circumstances which should have brought his object to its notice, and they delayed the goods so that they were too late for exhibition, it was held that, though the ascertainment of damages was difficult and speculative, this was no reason for not giving damages.²⁹¹ It is generally held, however, that while profits which would have been realized but for the breach of contract may be allowed as a proper element of damages, they must be proved with reasonable certainty, and not be merely conjectural, and that speculative or contingent profits cannot be recovered.²⁹²

²⁸⁹ Southard v. Rexford, 6 Cow. (N. Y.) 254; Thorn v. Knapp, 42 N. Y. 474, 1 Am. Rep. 561; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321; Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745. Cf. Clement v. Brown, 57 Minn. 314, 59 N. W. 198.

²⁹⁰ Ante, p. 411.

²⁹¹ Simpson v. Railway Co., 1 Q. B. Div. 274. And see WAKEMAN v. MANUFACTURING CO., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385.

²⁹² Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Dennis v. Maxfield, 10 Allen (Mass.) 138; U. S. v. BEHAN, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; Howard v. Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Brigham v. Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Fairchild v. Rogers, 32 Minn. 269, 20 N. W. 191; Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; Ætna Life Ins. Co. v. Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Allis v. McLean, 48 Mich. 428, 12 N. W. 640; Howe Mach. Co. v. Bryson, 44 Iowa, 159, 24 Am. Rep. 735; Hubbard v. Rowell, 51 Conn. 423; Rice v. Caudle, 71 Ga. 605; Lewis v. Insurance Co., 61 Mo. 534; Danforth v. Railroad Co., 99 Ala. 331, 13 South. 51.

SAME—SPECIFIC PERFORMANCE.

260. A suit in equity will, as a rule, lie for specific performance of a contract, except—

EXCEPTIONS—(a) Where there is an adequate remedy at law.

(b) Where the matter of the contract is such that the court cannot supervise performance.

(c) Where the enforcement of specific performance would be inequitable and unjust.

The courts of common law have no power to compel specific performance, and specific performance is often the only adequate remedy. This remedy, however, is given by courts of equity. They can enforce a promise to do a thing by a decree for specific performance, and a promise to forbear from doing a thing by an injunction.

The exercise of this jurisdiction by courts of equity is limited by certain rules, some of which we have already noticed in other connections.²⁹³ The subject being one relating more peculiarly to the jurisdiction of courts of equity, we can only deal with it in a very general way.

Adequate Remedy at Law.

A suit for specific performance will not lie if there is an adequate remedy at law. It will only lie where the loss cannot be compensated in damages.²⁹⁴ This rule is well illustrated by the different attitudes which the court has assumed in this matter towards contracts for the sale of land and contracts for the sale of goods. One who has contracted to purchase a particular piece of land may be unable to get its exact counterpart elsewhere, with the same surroundings and conveniences. Courts of equity will therefore generally grant specific performance of contracts for the sale of land.²⁹⁵ On the other hand, goods of the kind and quality contracted for are generally to be purchased elsewhere. Hence specific performance of a contract for the sale of goods will not be decreed,²⁹⁶ except in the case of specific chat-

²⁹³ Ante, pp. 60, 163, 235.

²⁹⁴ *Campbell v. Potter*, 147 Ill. 576, 35 N. E. 364; *American Box Mach. Co. v. Crossman*, 61 Fed. 888, 10 C. C. A. 146; *Gove v. City of Biddleford*, 85 Me. 393, 27 Atl. 264; *Porter v. Water Co.*, 84 Me. 195, 24 Atl. 814.

²⁹⁵ *Eastern C. R. Co. v. Hawkes*, 5 H. L. 331, 359; *Johnston v. Wadsworth*, 24 Or. 494, 34 Pac. 13. But courts of equity will not even compel specific performance of a contract to buy land simply to enforce payment of the purchase money. *Holley v. Anness*, 41 S. C. 349, 19 S. E. 646.

²⁹⁶ *Cuddee v. Rutter*, 1 P. Wms. 569, 5 Vin. Abr. p. 538, § 21, 1 White & T. Lead. Cas. Eq. [4th Am. Ed.] 1063; *Lining v. Geddes*, 1 McCord. Eq. (S. C.) 204, 16 Am. Dec. 606; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Kimball v. Morton*, 5 N. J. Eq. 26, 53 Am. Dec. 621; *Rollins Inv. Co. v. George* (C. C.) 48 Fed. 776.

tels, the value of which, either from their beauty, the interest attaching to them, or some other cause, cannot be represented by damages.²⁹⁷

Inability of Court to Supervise and Insure Performance.

A court of equity will not decree specific performance where the matter of the contract is such that it cannot supervise or insure its execution.²⁹⁸ This rule is illustrated by the refusal of courts of equity to decree specific performance of contracts involving personal services.²⁹⁹ An injunction may be used to enforce a promise or covenant to forbear. It has been held that where an executory contract contains both positive and negative promises, and the court is unable to enforce the former, it may nevertheless enforce the latter by an injunction. Thus where a professional singer was sued by the proprietor of a theater for specific performance of a contract to sing at his theater upon certain terms, and during a certain period to sing nowhere else, the court refused to enforce so much of the contract as related to the promise to sing, but enforced the promise not to sing elsewhere by granting an injunction.³⁰⁰

Specific Performance Discretionary.

The enforcement of specific performance is discretionary with the court, and the court must be satisfied not only that there was a valid contract, but that its enforcement would be equitable and just.³⁰¹ "It must appear that the enforcement will work no hardship and injustice, for, if that result would follow, the court will leave the parties to their

²⁹⁷ *De Mattos v. Gibson*, 4 De Gex & J. 276; *Buxton v. Lester*, 3 Atk. 384; *Hapgood v. Rosenstock* (C. C.) 20 Fed. 86; *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; *Hull v. Pitrat* (C. C.) 45 Fed. 94; *Eaton, Eq.* 527.

²⁹⁸ *Wilson v. Railway Co.*, L. R. 9 Ch. App. 279; *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630.

²⁹⁹ *Lumley v. Wagner*, 1 De Gex, M. & G. 616; *Webb v. England*, 29 Beav. 44; *Clark's Case*, 1 Blackf. (Ind.) 122, 12 Am. Dec. 213; *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 7 L. R. A. 779, 18 Am. St. Rep. 278.

³⁰⁰ *Lumley v. Wagner*, 1 De Gex, M. & G. 616. And see *McCaul v. Braham* (C. C.) 16 Fed. 37; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622; *CORT v. LASSARD*, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726; *Port Clinton R. Co. v. Railroad Co.*, 13 Ohio St. 544; *Daly v. Smith*, 38 N. Y. Super. Ct. 158, 49 How. Prac. 150; *Richardson v. Peacock*, 26 N. J. Eq. 49. Cf. *Davis v. Foreman* [1894] 3 Ch. 654; *Rice v. D'Arville*, 162 Mass. 559, 39 N. E. 180; *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98. The principal case has been declared an anomaly to be followed in cases like it, but which it would be dangerous to extend. *Anson, Cont.* (8th Ed.) 314.

³⁰¹ *Webster v. Cecil*, 30 Beav. 62; *Hennessey v. Woolworth*, 128 U. S. 438, 9 Sup. Ct. 109, 32 L. Ed. 500; *Conger v. Railroad Co.*, 120 N. Y. 29, 23 N. E. 983; *Mansfield v. Sherman*, 81 Me. 365, 17 Atl. 300; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532.

remedy at law, unless the granting of the specific relief can be accomplished with conditions which will obviate that result."³⁰²

SAME—DISCHARGE OF RIGHT OF ACTION.

261. The right of action arising from a breach of contract can only be discharged in one of three ways:

- (a) By the consent of the parties.
- (b) By the judgment of a court of competent jurisdiction.
- (c) By lapse of time.

SAME—DISCHARGE BY THE CONSENT OF THE PARTIES.

262. Discharge by the consent of the parties may take place either—

- (a) By release, which is a gratuitous waiver of the right of action, and must therefore be under seal.
- (b) By accord and satisfaction, which is an agreement to discharge the right of action based on a consideration which is executed.³⁰³

Release.

A release is a gratuitous waiver by a person of a right of action accruing to him from a breach of a promise made to him. There is no consideration for the waiver, and therefore, to be binding, it is necessary that it shall be under seal.³⁰⁴ As we have seen, a gratuitous promise to forbear from the exercise of a right, if it is not under seal, is not enforceable.³⁰⁵

Accord and Satisfaction.

An accord and satisfaction is an agreement, which need not be under seal, the effect of which is to discharge the right of action possessed by one of the parties against the other. In order to have this effect, there must be a consideration for the promise of the party entitled to sue. It is further necessary that the accord shall be executed; otherwise the agreement is an accord without a satisfaction.³⁰⁶ The promisor

³⁰² Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501.

³⁰³ Anson, Cont. (4th Ed.) 314.

³⁰⁴ MITCHELL v. HAWLEY, 4 Denio (N. Y.) 414, 47 Am. Dec. 260; Jackson v. Stackhouse, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; Shaw v. Pratt, 22 Pick. (Mass.) 308; HUNT v. BROWN, 146 Mass. 253, 15 N. E. 587; Ingersoll v. Martin, 58 Md. 67, 42 Am. Rep. 322; KIDDER v. KIDDER, 33 Pa. 268.

³⁰⁵ Ante, pp. 126-133.

³⁰⁶ Bayley v. Homan, 3 Bing. N. C. 915; LYNN v. BRUCE, 2 H. Bl. 317; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; Hosler v. Hursh, 151 Pa. 415, 25 Atl. 52; Costello v. Cady, 102 Mass. 140; Petty v. Allen, 134 Mass. 265; Flack v. Garland, 8 Md. 188; Simmons v. Clark, 56 Ill. 96; Pettis v. Ray, 12 R. I. 344; Hoxsie v. Lumber Co., 41 Minn. 548, 43

must have obtained what he bargained for in lieu of his right of action, and he must have obtained something more than a mere fresh arrangement as to the payment or discharge of the existing liability.³⁰⁷ It is not meant by this that a promise can never be received as a satisfaction. If the promise and not its performance is accepted in satisfaction, it is a good accord and satisfaction without performance. In other words, a new contract agreed upon, and accepted, as a satisfaction, operates as an accord and satisfaction.³⁰⁸ The satisfaction may consist in the acquisition of a new right against the debtor, as the receipt from him of a negotiable instrument in lieu of payment;³⁰⁹ or of new rights against the debtor and third persons, as in the case of a composition with creditors;³¹⁰ or of something different in kind from that which the debtor was bound by the original contract to perform;³¹¹ but it must have been taken by the creditor as satisfaction for his claim in order to operate as a valid discharge. There can be no satisfaction without accord or agreement to that effect.³¹²

N. W. 476; *Schlitz v. Meyer*, 61 Wis. 418, 21 N. W. 243; *Cobb v. Malone*, 86 Ala. 571, 6 South. 6; *Ogilvie v. Hallam*, 58 Iowa, 714, 12 N. W. 730; *Browning v. Crouse*, 43 Mich. 489, 5 N. W. 664; *Troutman v. Lucas*, 63 Ga. 466; *Frost v. Johnson*, 8 Ohio, 393; *Simmons v. Hamilton*, 56 Cal. 493; *Johnson's Adm'r v. Hunt*, 81 Ky. 321; *Hemingway v. Stansell*, 106 U. S. 399, 1 Sup. Ct. 473, 27 L. Ed. 245; *Yazoo & M. V. R. Co. v. Fulton*, 71 Miss. 385, 14 South. 271; *Welch v. Miller*, 70 Vt. 108, 39 Atl. 749.

³⁰⁷ *McManus v. Bank*, L. R. 5 Exch. 65.

³⁰⁸ *BABCOCK v. HAWKINS*, 23 Vt. 561; *MOREHOUSE v. BANK*, 98 N. Y. 503; *Whitney v. Cook*, 53 Miss. 551; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136; *Heirn v. Carron*, 11 Smodes & M. (Miss.) 361, 49 Am. Dec. 65; *Christie v. Craige*, 20 Pa. 430; *Bradshaw v. Davis*, 12 Tex. 336; *Bennett v. Hill*, 14 R. I. 322; *SCHWEIDER v. LANG*, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; *Sioux City Stock-Yards Co. v. Packing Co.*, 110 Iowa, 336, 81 N. W. 712.

³⁰⁹ *Goddard v. O'Brien*, 9 Q. B. Div. 37; *Witherby v. Mann*, 11 Johns. (N. Y.) 518; *Guild v. Butler*, 127 Mass. 386; *Varney v. Conery*, 77 Me. 527, 1 Atl. 683; *Yates v. Valentine*, 71 Ill. 643; *Mason v. Campbell*, 27 Minn. 54, 6 N. W. 405.

³¹⁰ Ante, p. 133.

³¹¹ Ante, p. 131.

³¹² *Preston v. Grant*, 34 Vt. 201; *Boston Rubber Co. v. Wringer Co.*, 58 Vt. 551, 5 Atl. 407. Thus it is held in England that if money or a check is tendered in full satisfaction of an unliquidated demand, and is kept by the creditor, it is a question of fact whether or not he accepts the payment as on the terms offered, i. e., whether he assents to an accord and satisfaction. *DAY v. McLEA*, 22 Q. B. Div. 610. To the same effect, *Tompkins v. Hill*, 145 Mass. 379, 14 N. E. 177. The American cases, however, generally hold, anomalously, that in such case an accord and satisfaction results, even though the creditor insists that the payment is accepted merely on account. *Fuller v. Kemp*, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; *NASSOY v. TOMLINSON*, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; *Laroe v. Dairy Co.*, 87 App. Div. 585, 84 N. Y. Supp. 609 (cf. *Mack v. Miller*, 87 App. Div. 359, 84 N. Y. Supp. 440); *Anderson v. Granite Co.*, 92 Me. 429, 43 Atl. 21, 69 Am. St. Rep. 522; *Rosema v. Porter*, 112 Mich. 13, 70 N. W. 316; *Lapp v. Smith*,

We have already fully considered the question of the sufficiency of the consideration.³¹³

SAME—DISCHARGE BY JUDGMENT.

263. The right of a party to sue for breach of contract is discharged by the final judgment of a court of competent jurisdiction either in his favor or against him. In the former case the cause of action merges in the judgment, while in the latter the judgment estops him.³¹⁴

When the party entitled to sue for the breach of a contract made with him brings an action in a court of competent jurisdiction, and recovers a judgment, his right of action is thereby discharged. It merges in the judgment.³¹⁵ The result of legal proceedings taken upon a broken contract may be thus summarized: The bringing of an action has not of itself any effect in discharging the right of action. Another action may be brought for the same cause in another court, and, though proceedings in such an action would be stayed, if they are merely vexatious, yet if action for the same cause is brought in a home court and in a foreign court, the fact that the defendant is being sued in the latter would not in any way affect his position in the former.³¹⁶ When the action is pursued to judgment, a judgment adverse to the plaintiff discharges the obligation by estoppel. The plaintiff cannot bring another action for the same cause so long as the judgment stands.³¹⁷ The matter is *res judicata*. The judgment may be reversed

183 Ill. 179, 55 N. E. 717; *HULL v. JOHNSON*, 22 R. I. 66, 46 Atl. 182; *Talbot v. English*, 156 Ind. 299, 59 N. E. 857. And see *Preston v. Grant*, 34 Vt. 201.

³¹³ Ante, pp. 129-132.

³¹⁴ Anson, Cont. (4th Ed.) 315, 316.

³¹⁵ *Mason v. Eldred*, 6 Wall. 231, 18 L. Ed. 783; *Smith v. Black*, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *MILLER v. COVERT*, 1 Wend. (N. Y.) 487; *Bender-nagle v. Cocks*, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; *Turner v. Plowden*, 5 Gill & J. (Md.) 52, 23 Am. Dec. 596; *Oliver v. Holt*, 11 Ala. 374, 46 Am. Dec. 288; *Boynton v. Ball*, 105 Ill. 627; *Pike v. McDonald*, 32 Me. 418, 54 Am. Dec. 597; *Barnes v. Gibbs*, 31 N. J. Law, 317, 86 Am. Dec. 210.

³¹⁶ *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782; *Wood v. Gamble*, 11 Cush. (Mass.) 8, 59 Am. Dec. 435; *O'Reilly v. Railroad Co.*, 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719; *Sandwich Mfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 938; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Smith v. Lathrop*, 44 Pa. 326, 84 Am. Dec. 418; *Davis v. Morton*, 4 Bush (Ky.) 442, 96 Am. Dec. 309. This does not apply to actions in rem.

³¹⁷ *Patrick v. Shaffer*, 94 N. Y. 423; *Norton v. Doherty*, 3 Gray (Mass.) 372, 63 Am. Dec. 758; *Winslow v. Stokes*, 48 N. C. 285, 67 Am. Dec. 242; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195; *Nispel v. Laparle*, 74 Ill. 306.

by a higher court, or a new trial granted, and the parties may be re-mitted to their original positions.³¹⁸

An adverse judgment, in order to discharge the obligation by estopping the plaintiff from reasserting his claim, must have proceeded upon the merits of the case and must be final. Where the litigation has ended in a discontinuance or a nonsuit, or on demurrer for defect in pleading, so that an actual decision on the merits has not been reached; or the finding of a judge or referee has not passed into a judgment, and so become absolutely fixed and final,—the proceedings have no conclusive character, and cannot operate as a bar.³¹⁹ So, if a plaintiff fails in his action because he has sued in a wrong character, or because he sued at a wrong time, as in case of an action brought before fulfillment of a condition in the contract, such as the expiration of a period of credit on the sale of goods,—a judgment proceeding on these grounds will not prevent him from succeeding in a second action.³²⁰ It is also necessary that the judgment shall have been rendered by a court of competent jurisdiction and shall be otherwise valid.³²¹ As has been said, if the plaintiff succeeds, and obtains judgment in his favor, the right of action merges in the judgment, and is discharged. A new obligation arises in the judgment, a form of the so-called “contract of record,—a quasi contractual obligation.” The obligation arising from the judgment may be discharged by payment of the judgment debt, or by satisfaction obtained by the creditor from the property of the debtor by the process of execution, or an action quasi ex contractu may be brought upon it.

³¹⁸ *Clark v. Bowen*, 22 How. 270, 16 L. Ed. 337; *Mattingly v. Lewisohn*, 13 Mont. 508, 35 Pac. 111.

³¹⁹ *Webb v. Buckelew*, 82 N. Y. 555; *Audubon v. Insurance Co.*, 27 N. Y. 216; *Leonard v. Barker*, 5 Denio (N. Y.) 220; *Atkins v. Anderson*, 63 Iowa, 739, 19 N. W. 323; *Taylor v. Larkin*, 12 Mo. 103, 49 Am. Dec. 119; *Gould v. Railroad Co.*, 91 U. S. 526, 23 L. Ed. 416; *Linington v. Strong*, 111 Ill. 152; *Gage v. Ewing*, 114 Ill. 15, 28 N. E. 379; *Schurmeier v. Johnson*, 10 Minn. 319 (Gil. 250); *Haws v. Tiernan*, 53 Pa. 192; *Gallup v. Lichter*, 4 Colo. App. 296, 35 Pac. 985; *Baugh v. Baugh*, 4 Bibb (Ky.) 536; *Pierce v. Hilton*, 102 Cal. 276, 36 Pac. 595; *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571.

³²⁰ *Bull v. Hopkins*, 7 Johns. (N. Y.) 22; *McFarlane v. Cushman*, 21 Wis. 406; *Brackett v. People*, 115 Ill. 29, 3 N. E. 723; *Rodgers v. Levy*, 36 Neb. 601, 54 N. W. 1080; *Baxter v. Aubrey*, 41 Mich. 13, 1 N. W. 897; *Wood v. Faut*, 55 Mich. 185, 20 N. W. 897.

³²¹ *Hickey v. Stewart*, 3 How. 750, 11 L. Ed. 814; *Stowell v. Chamberlain*, 60 N. Y. 272; *Reading v. Price*, 3 J. J. Marsh. (Ky.) 62, 19 Am. Dec. 162; *Mount v. Scholes*, 120 Ill. 394, 11 N. E. 401; *Richardson v. Aiken*, 84 Ill. 221; *Oleson v. Merrihew*, 45 Wis. 397.

SAME—LAPSE OF TIME.

264. Lapse of time may affect the remedy of the parties to a contract, but, in the absence of statutory provision, it cannot affect their rights.

265. In all the states there are statutes of limitation barring actions on contracts unless they are brought within a prescribed time.

Laches may bar the right to relief in equity,³²² and at law a creditor's delay in asserting his claim may raise a rebuttable presumption that the debt is paid;³²³ but, aside from this, lapse of time, in the absence of statutory provision, does not affect the rights of the parties to a contract. The rights arising from a contract are of a permanent and indestructible character, unless either from the nature of the contract or from its terms it is limited in point of duration.³²⁴

In all states, however, there are "statutes of limitations," which provide that actions on contracts must be brought within a certain number of years, or be barred. The time limited varies in the different states. In some states no distinction with respect to the time limited is made between the different kinds of contracts, while in others such a distinction is made. These statutes vary in other respects, and only brief mention of some of their more general provisions can be made.

Disabilities and Exceptions.

Though, as a rule, the statute begins to run as soon as the cause of action accrues, and continues to run until the bar is complete, there are certain circumstances which suspend its operation. It is generally provided that infancy, coverture, insanity, or imprisonment shall, where the person entitled to sue is affected by any of these disabilities when the cause of action accrues, suspend the operation of the statute until the disability is removed. A disability arising after the period of limitation has commenced to run will not affect the operation of the statute.

As a rule, ignorance that a right of action exists will not suspend the operation of the statute. Where, however, that ignorance was pro-

³²² Eads v. Williams, 4 De Gex, M. & G. 674; Southcombe v. Bishop, 6 Hare, 213; Seculovich v. Morton, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106; Rogers v. Van Nortwick, 87 Wis. 414, 58 N. W. 757; Hogan v. Kyle, 7 Wash. 595, 35 Pac. 399, 38 Am. St. Rep. 910; Cocanougher v. Green, 93 Ky. 519, 20 S. W. 542; Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635; Patterson v. Martz, 8 Watts (Pa.) 374, 34 Am. Dec. 474.

³²³ Williams v. Mitchell, 112 Mo. 300, 20 S. W. 647; Knight v. McKinney, 84 Me. 107, 24 Atl. 744; Wannmaker v. Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Atkinson v. Dance, 9 Yerg. (Tenn.) 424, 30 Am. Dec. 422; Stover v. Duren, 3 Strob. (S. C.) 448, 51 Am. Dec. 634; Walker v. Emerson, 20 Tex. 706, 73 Am. Dec. 207.

³²⁴ Anson, Cont. (4th Ed.) 316; Llanelly Ry. & Dock Co. v. Railway Co., L. R. 7 H. L. 550, 567.

duced by the fraud of the defendant, and no reasonable diligence would have enabled the plaintiff to discover that he had a cause of action, the statutory period commences with the discovery of the fraud.

Acknowledgment and New Promise.

Ordinarily the statute of limitations is held merely to bar the remedy, but not to extinguish the right, and therefore the right of action, after it has become barred, may be revived.³²⁵ Where a simple contract, for instance, has resulted in a money debt, the right of action may be revived by subsequent acknowledgment or promise. In some jurisdictions there are statutory provisions requiring that the acknowledgment or promise, to be effectual, must be in writing, signed by the party to be charged or his duly-authorized agent. The sort of acknowledgment or promise which has been held to be requisite in order that a simple contract debt may be revived so as to start the running of the statute anew has been thus described: "There must be one of these three things to take the case out of the statute: Either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."³²⁶

Same—Part Payment.

A debt barred by the statute may also be revived by a part payment. A payment on account of the principal, or a payment of interest on the debt, will take the contract out of the statute. It is provided by most, if not all, of the statutes requiring a new promise or acknowledgment to be in writing, and signed by the promisor or his agent, that nothing therein contained shall take away or lessen the effect of such part payments. The payment, to have the effect of reviving the debt, must be made with reference to the original debt, and in such a manner as to amount to an acknowledgment of it.³²⁷

³²⁵ *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483. Contra, *Pierce v. Seymour*, 52 Wis. 272, 9 N. W. 71, 38 Am. Rep. 737.

³²⁶ *In re River Steamer Co.*, 6 Ch. App. 822, 828. Some courts have held that a mere acknowledgment of the debt as existing is sufficient to remove the bar, even though there be an express declaration of intention not to pay it; but most courts hold that this is not enough (regarding the statute as one of repose rather than one of presumption), but that the acknowledgment must be of such a nature as to show that the debtor intended to promise to pay. *Biddell v. Brizzolara*, 64 Cal. 354, 30 Pac. 609; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614; *Heany v. Schwartz*, 155 Pa. 154, 25 Atl. 1078; *Perry v. Chesley*, 77 Me. 393; *Hussey v. Kirkman*, 95 N. C. 63. As to conditional promises, see *Boynton v. Moulton*, 159 Mass. 248, 34 N. E. 361.

³²⁷ *Waters v. Tompkins*, 2 Crompt., M. & R. 722; *Miner v. Lorman*, 56 Mich. 212, 22 N. W. 265; *State v. Corlies*, 47 N. J. Law, 108; *Sears v. Hicklin*, 3 Colo. App. 331, 33 Pac. 137; *Benton v. Holland*, 58 Vt. 533, 3 Atl. 322; *Blaskower v. Steel*, 23 Or. 106, 31 Pac. 253.

CHAPTER XII.

AGENCY.

- 266. **Creation of the Relation—Capacity of Parties.**
- 267. How the Relation may Arise.
- 268-269. Form of Authority.
- 270. Agency by Estoppel.
- 271. Ratification.
- 272-273. **Effect of Relation—Rights and Liabilities of Principal and Agent inter Se.**
- 274. Rights and Liabilities as to Third Persons—Named Principal.
- 275. Name of Principal Undisclosed.
- 276. Existence of Principal Undisclosed.
- 277. Fraud of Agent.
- 278. Determination of the Relation.

In dealing with the operation of contract we noted that though one person cannot, by contract with another, confer rights or impose liabilities upon a third, yet that one person may represent another as being employed by him for the purpose of bringing him into legal relations with a third. Employment for this purpose is called "agency." The employer is called the "principal," and the employed his "agent." In dealing with the subject we shall consider (1) the mode in which the relation of principal and agent is formed; (2) the effects of the relation when formed; and (3) the mode in which the relation is brought to an end.

CREATION OF THE RELATION—CAPACITY OF PARTIES.

- 266. Any one may be an agent, but no one can appoint an agent unless he is otherwise capable of contracting.**

The contract between principal and agent by which the relation is formed is like any other contract, in so far as the principal is concerned, in requiring capacity to contract. A person who is incapable of entering into a valid contract is incapable of employing an agent to enter into contracts for him. Any one, however, may be an agent, whether he has capacity to contract or not.¹

¹ Mechem, Ag. §§ 44-68; Governor v. Daily, 14 Ala. 469; Lyon v. Kent, 45 Ala. 656; Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; Chastain v. Bowman, 1 Hill (S. C.) 270; Gray v. Otis, 11 Vt. 628; Hopkins v. Molinieux, 4 Wend. (N. Y.) 495; Butler v. Price, 110 Mass. 97. As to capacity of principal, Tiffany, Ag. 94; capacity of agent, Id. 105.

SAME—HOW THE RELATION MAY ARISE.

267. The relation of principal and agent arises by agreement of the parties, evidenced by words or by conduct; and this may be:

- (1) By the offer of a promise for an act and performance of the act; or from consideration executed upon request. Cases of gratuitous agency are within this class.**
- (2) By the offer of an act for a promise, or by the acceptance of an executed consideration. Such are cases of ratification.**
- (3) By the offer of a promise for a promise, resulting in mutual promises.**

As regards the mode in which the assent of the parties may be signified, we may accept the processes described in treating of offer and acceptance.

It may arise by the offer of a promise for an act, and acceptance by performance of the act, or, in other words, from consideration executed upon request, as where services are asked for in such a manner as to import a promise of indemnity for any loss, risk, or expense incurred in rendering them. Such are all cases of gratuitous agency, in which the parties do not create, and possibly do not contemplate, as between themselves, any legal relation at the time the request is made. The obligation springs up when the service is rendered. The agent then becomes liable for misperformance of his undertaking, and the principal upon his implied promise of indemnity. It is said that a man who undertakes to do a service for another gratuitously is liable only for misfeasance, and not for nonfeasance. By this is meant that, where a man undertakes to act as agent or to do any other service for another gratuitously, the contractual liability does not arise until he has entered upon the work, and so affected the position of his employer, and that up to that moment there is nothing but a request to him to do the work importing a promise to indemnify him for losses which he may incur in doing it. He is not bound to perform the services, but, if he undertakes or enters upon the performance of them, he must perform. Where a person, for instance, voluntarily promises another to effect insurance on the latter's property, he is not liable if he neglects to insure at all; but if he does attempt to insure, and negligently, by omitting necessary formalities, takes out a policy upon which there can be no recovery, he is liable for the loss.²

Again, the relation may be created by the offer of an act for a promise, or by the acceptance of an executed consideration. Such is the case where a person without authority makes a contract on behalf of

² *Wilkinson v. Coverdale*, 1 Esp. 74. And see *THORNE v. DEAS*, 4 Johns. (N. Y.) 84; *Nixon v. Bogin*, 26 S. C. 611, 2 S. E. 302.

another, and the latter subsequently accepts the bargain or ratifies the contract.³ This we shall presently consider more at length.

Again, the relation may be created by mutual promises to employ and remunerate on one side, and to do the work required on the other.

Quasi ex Contractu—Necessity.

Circumstances operating upon the conduct of the parties may in certain cases create a so-called agency from necessity. A husband is bound to support his wife, and, if he wrongfully leaves her without means of subsistence, she becomes "an agent of necessity to supply her wants upon his credit."⁴

A carrier of goods or a master of a ship may under certain circumstances, in the interest of his employer, pledge his credit, and will be considered to have his authority to do so. So, also, where goods are shipped to a person unordered, or not in correspondence with samples, it has been held that the consignee may, in the interest of the consignor, effect a sale of them.⁵

In none of these cases does the relation of principal and agent arise from agreement. It is imposed by law. It is an agency quasi ex contractu.

Partnership.

The contract of partnership confers on each partner an authority to act for the others in the ordinary course of the partnership business, and each partner accepts a corresponding liability for the acts of his copartners.⁶

³ Anson, Cont. (4th Ed.) 333. It may be doubted whether the analogy of offer and acceptance is not misleading. The proposed principal has an election to treat the contract as his own or not. Tiffany, Ag. 47.

⁴ Eastland v. Burchell, 3 Q. B. Div. 436; Seybold v. Morgan, 43 Ill. App. 39; Pierpont v. Wilson, 49 Conn. 450; Benjamin v. Dockham, 134 Mass. 418; Watkins v. De Armond, 89 Ind. 553; Eiler v. Crull, 99 Ind. 375; Ferren v. Moore, 59 N. H. 106.

⁵ Kemp v. Pryor, 7 Ves. 246.

⁶ Hawken v. Bourne, 8 Mees. & W. 710; Tillier v. Whitehead, 1 Dall. (Pa.) 269, 1 L. Ed. 131; Lucas v. Bank, 2 Stew. (Ala.) 280.

SAME—FORM OF AUTHORITY—ESTOPPEL.

- 268. Authority to make a contract under seal must be under seal; but an agent may, under parol authority, attach a seal for his principal in his presence and by his direction.**
- 269. Authority to make a parol contract, whether the contract is required by the statute of frauds to be in writing or not, may, unless otherwise provided by statute, be either in writing, or by word of mouth, or by conduct.**
- 270. ESTOPPEL. A person may by his words or conduct be estopped to deny that another person has authority to make a contract.**

In order that an agent may make a binding contract under seal, he must receive authority under seal.⁷ Such a formal authority is called a "power of attorney." There is an exception to this rule, and it is said to be the only exception,—where the agent affixes the seal of the principal in his presence and by his direction.⁸

In some states the authority of an agent to make a contract for the sale of land is required by the statute of frauds to be in writing.⁹ And in Kentucky authority to bind another as surety is required by statute to be in writing.¹⁰ Aside from this and possibly other statutory requirements, authority, even to enter into a contract required by the statute of frauds to be in writing, need not be given in any special form. Writing or words may indicate the intention of the parties.¹¹

⁷ *Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Heath v. Nutter*, 50 Me. 378; *Kime v. Brooks*, 31 N. C. 218; *Rowe v. Ware*, 30 Ga. 278; *Perry v. Smith*, 29 N. J. Law, 74; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Shuetze v. Bailey*, 40 Mo. 69; *Elliott v. Stocks*, 67 Ala. 336; *Gordon v. Bulkeley*, 14 Serg. & R. (Pa.) 331; *Wheeler v. Nevins*, 34 Me. 54; *Baker v. Freeman*, 35 Me. 485; *Cummins v. Cassily*, 5 B. Mon. (Ky.) 74; *Cain v. Heard*, 1 Cold. (Tenn.) 163; *Graham v. Holt*, 25 N. C. 300, 40 Am. Dec. 408; *Maus v. Worthing*, 4 Ill. 26. Parol authority is sufficient to enable an agent to make a binding parol contract for a conveyance under seal by the principal, though the agent himself could not so convey without authority under seal. *Ledbetter v. Walker*, 31 Ala. 175; *Baum v. Dubois*, 43 Pa. 260; *Force v. Dutcher*, 18 N. J. Eq. 401. A contract under seal, made by an agent under parol authority, may be binding as a parol contract where the seal may be rejected as surplusage. *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Tapley v. Butterfield*, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; *Dickerman v. Ashton*, 21 Minn. 538; *Nichols v. Haines*, 98 Fed. 692, 39 C. C. A. 235. *Contra*, *Wheeler v. Nevins*, 34 Me. 54.

⁸ *Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *Ball v. Dunsterville*, 4 Term R. 313; *Gardner v. Gardner*, 5 Cush. (Mass.) 483, 52 Am. Dec. 740.

⁹ Ante, p. 90.

¹⁰ *First Nat. Bank v. Gaines*, 87 Ky. 597, 9 S. W. 396.

¹¹ Ante, p. 90; *Shaw v. Nudd*, 8 Pick. (Mass.) 9; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *Moreland v. Houghton*, 94 Mich. 548, 54 N. W. 285; *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345; *Kennedy v. Ehlen*, 31 W. Va. 510, 8 S. E. 398; *Watson v. Sherman*, 84 Ill. 267; *Blacknall v.*

Same—Implied Authority—Conduct.

Not only is this true, but authority may be implied from conduct. If a master allows his servant or child to habitually purchase goods for him from a tradesman on credit, the latter becomes entitled to look to the master for payment for such things as are supplied to the servant or child in the ordinary course of dealing. So, also, with husband and wife. Marriage and cohabitation do not of themselves imply authority in the wife to pledge her husband's credit; but, if the wife is allowed to deal with a tradesman, the husband will be considered to have held her out as his agent, and will be liable for her purchases.¹² "If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demurrer in respect of such dealings, the tradesman has the right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume."¹³ There is nothing, however, in the relation of master and servant, parent and child, or husband and wife to give an inherent authority to the servant, child, or wife.¹⁴ The authority can only spring from the words or conduct of the master, parent, or husband. So, also, a wife may, by her conduct, hold out and constitute her husband as her agent. He has no inherent authority to act for her,¹⁵ but if, by her conduct, she holds him out as her agent, she will be bound by his acts within the scope of his apparent authority.¹⁶

These relations enable an authority to be the more readily inferred

Parish, 59 N. C. 70, 78 Am. Dec. 239; Curtis v. Blair, 26 Miss. 309, 59 Am. Dec. 257; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747. But see Simpson v. Commonwealth, 89 Ky. 412, 12 S. W. 630.

¹² Debenham v. Mellon, 5 Q. B. Div. 403; Fenner v. Lewis, 10 Johns. (N. Y.) 38; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 284; Gates v. Brower, 9 N. Y. 205, 59 Am. Dec. 530; Snell v. Stone, 23 Or. 327, 31 Pac. 663. So where a husband allows his wife to manage his farm and attend to the business of it. Benjamin v. Benjamin, *supra*.

¹³ Debenham v. Mellon, 5 Q. B. Div. 403.

¹⁴ Sawyer v. Cutting, 23 Vt. 486; Johnson v. Stone, 40 N. H. 197, 75 Am. Dec. 706; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 284; Owen v. White, 5 Port. (Ala.) 435, 30 Am. Dec. 572; Savage v. Davis, 18 Wis. 608; Gavin v. Bishoff, 80 Iowa, 605, 45 N. W. 306; Lane v. Ironmonger, 13 Mees. & W. 368; Gulick v. Grover, 31 N. J. Law, 182.

¹⁵ Mead v. Spalding, 94 Mo. 43, 6 S. W. 384; Gilbert v. Deshon, 107 N. Y. 324, 14 N. E. 318; McLaren v. Hall, 26 Iowa, 297; Price v. Seydel, 46 Iowa, 696; Trimble v. Thorson, 80 Iowa, 246, 45 N. W. 742; Runyon v. Snell, 116 Ind. 164, 18 N. E. 522, 9 Am. St. Rep. 839.

¹⁶ Arnold v. Spurr, 130 Mass. 347; Rankin v. West, 25 Mich. 195; Lavassar v. Washburne, 50 Wis. 200, 6 N. W. 516.

from conduct; but, apart from them, conduct alone may create so strong an appearance of authority as to estop the party from denying its existence.¹⁷ Thus, where the plaintiff had allowed a broker to purchase hemp for him, and by plaintiff's desire it was entered in the place of deposit in the broker's name. The broker sold the hemp, and it was held that plaintiff's conduct gave him authority to do so. "Strangers," it was said, "can only look to the acts of the parties and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and, if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority."¹⁸ This is called by Sir William Anson "agency by estoppel."

SAME—RATIFICATION.

271. Ratification is where a person adopts a contract made on his behalf by another without authority; and it is governed by the following rules:

- (a) **The agent must have contracted as agent, and not on his own account.**
- (b) **The principal must have been in contemplation, or at least ascertainable, at the time.**
- (c) **It follows that the principal must have been in existence at the time.**
- (d) **The contract must have been such as the principal had the legal capacity to make, and must have been lawful.**
- (e) **A contract may be ratified either by words or by conduct, but to be effectual it must be with a full knowledge, actual or constructive, of all the material facts.**

EXCEPTIONS—A contract under seal cannot be ratified except under seal, nor can a contract for which written authority is required by statute be ratified except by writing.

- (f) **A contract cannot be disaffirmed in part only. If ratified in part, the whole is ratified.**

An important mode of creating agency is by ratification. Where a contract is made by one person on behalf of another, but without authority, the latter, on learning of it, may confirm or adopt the contract, and take the benefits and liabilities of it. His ratification relates back, and is equivalent to prior authority.¹⁹ That "an act done for

¹⁷ *Pickering v. Busk*, 15 East, 38; *Gibson v. Hardware Co.*, 94 Ala. 346, 10 South. 304; *Paine v. Tillinghast*, 52 Conn. 532; *Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Emerson v. Miller*, 27 Pa. 278; *Johnson v. Hurley*, 115 Mo. 513, 22 S. W. 492; *Pennsylvania R. Co. v. Atha* (D. C.) 22 Fed. 920; *Crane v. Gruenewald*, 120 N. Y. 274, 24 N. E. 456, 17 Am. St. Rep. 643; *Tier v. Lampson*, 35 Vt. 179, 82 Am. Dec. 634.

¹⁸ *Pickering v. Busk*, 15 East, 38.

¹⁹ *Nesbitt v. Helser*, 49 Mo. 383; *Goss v. Stevens*, 32 Minn. 472, 21 N. W.

another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage."²⁰

The rules governing ratification are that the agent must have contracted, as agent, for a principal who was in contemplation, and in existence, at the time, either actually or in contemplation of law, and for such things as the principal could and lawfully might do.²¹

(1) In the first place, the agent must have contracted as agent, and not on his own account.²² A person cannot contract and incur a liability on his own account, and then assign it to some one else under color of ratification. If he has no principal at the time, and contracts in his own name, he can only divest himself of his rights and liabilities by assignment to the latter. If he has a principal at the time, and contracts in his own name, the other party, as we shall presently see, may either hold him personally liable, or may hold the principal liable, at his option.

(2) The agent must have acted for a principal who was in contemplation. He need not have been known, but he must at least have been capable of being ascertained.²³ He must not have made a contract, as agent, with the expectation that parties of whom he was not cognizant at the time would relieve him of his liabilities. The act must have

549; *Sheldon Hat-Blocking Co. v. Machine Co.*, 90 N. Y. 610; *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Mason v. Caldwell*, 5 Gilman (Ill.) 196, 48 Am. Dec. 330; *Strasser v. Conklin*, 54 Wis. 102, 11 N. W. 254; *Starks v. Sikes*, 8 Gray (Mass.) 609, 69 Am. Dec. 270; *McCracken v. City of San Francisco*, 16 Cal. 591; *Beidman v. Goodell*, 56 Iowa, 592, 9 N. W. 900; *Despatch Line of Packets v. Manufacturing Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Kinsley v. Norris*, 60 N. H. 131; *First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Wallace v. Lawyer*, 90 Ind. 499; *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85. To this statement there is this qualification: "The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification; in other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612.

²⁰ *Wilson v. Tummam*, 6 Man. & G. 236; *Forbes v. Hagman*, 75 Va. 178.

²¹ *Anson*, Cont. (4th Ed.) 335.

²² *Hamlin v. Sears*, 82 N. Y. 327; *Workman v. Wright*, 33 Ohio St. 405, 31 Am. Rep. 546; *Allred v. Bray*, 41 Mo. 484, 97 Am. Dec. 283; *Beveridge v. Rawson*, 51 Ill. 504; *Roby v. Cossitt*, 78 Ill. 638.

²³ *Foster v. Bates*, 12 Mees. & W. 226; *Roby v. Cossitt*, 78 Ill. 638.

been "done for another by a person not assuming to act for himself, but for such other person."²⁴

(3) The third rule necessarily follows, namely, that the principal must have been in existence, either actually or in contemplation of law, at the time the contract was made. "Ratification can only be by a person ascertained at the time of the act done,—by a person in existence either actually, or in contemplation of law, as in the case of the assignees of bankrupts, and administrators, whose title, for the protection of the estate, vests by relation."²⁵ This rule has been applied to contracts made by promoters of corporations on behalf of the corporation before its formation. It has been very generally held that the corporation could not become liable by mere ratification.²⁶ The principal need not have been in actual existence, but may have existed in contemplation of law only. A person, for instance, may contract on behalf of the estate of a deceased person or of a bankrupt, and the administrators or trustees in bankruptcy may ratify and adopt the contract, though they were not appointed, or even ascertained, at the time it was made.²⁷

(4) The fourth rule is that the agent must have contracted for such things as the principal had the legal capacity to do,²⁸ and might lawfully do.²⁹ There can be no ratification of a void act. And so, if an

²⁴ *Wilson v. Tumman*, 6 Man. & G. 236.

²⁵ *Kelner v. Baxter*, L. R. 2 C. P. 175.

²⁶ *Kelner v. Baxter*, L. R. 2 C. P. 175; *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193; *In re Empress Engineering Co.*, 16 Ch. Div. 125. But see *Bell's Gap R. Co. v. Christy*, 79 Pa. 54, 21 Am. Rep. 39; *Bommer v. Manufacturing Co.*, 81 N. Y. 468. Where the corporation has been formed when its agents enter into a contract, the fact that it has not filed its articles of incorporation, as required by statute to entitle it to do business, does not prevent it from ratifying the contract after filing its articles. *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050. And where the corporation, after it is formed, receives and enjoys the consideration, it may become liable as on an implied contract. *Bommer v. Manufacturing Co.*, 81 N. Y. 468; *Wood v. Whelen*, 93 Ill. 153; *McArthur v. Printing Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653; *Reichwald v. Hotel Co.*, 106 Ill. 439.

²⁷ *Kelner v. Baxter*, L. R. 2 C. P. 175; *Foster v. Bates*, 12 Mees. & W. 226.

²⁸ *Armitage v. Widoe*, 36 Mich. 124; *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. 27; *O'Conner v. Arnold*, 53 Ind. 203; *Davis v. Lane*, 10 N. H. 156; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435.

²⁹ *McCracken v. City of San Francisco*, 16 Cal. 591; *State v. Matthis*, 1 Hill (S. C.) 37; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Turner v. Insurance Co.*, 55 Mich. 237, 21 N. W. 326. "On this last ground it has been said that a forged signature cannot be ratified; but it would seem that ratification is not here in question, for one who forges the signature of another does not possess the authority of an agent, actually or in contemplation. The forger does not act for another; he personates the man whose signature he forges." *Anson, Cont.* 337. To the effect that a forged signature can be ratified, see *President, etc., of Greenfield Bank v. Crafts*, 4 Allen (Mass.) 417; *Forsyth v. Day*, 46 Me. 176; *Hefner v. Vandolah*, 62 Ill. 483,

agent enters into a contract on behalf of a principal who is incapable of making it, or if he enters into an illegal contract, no ratification is possible. The transaction is void,—in the one case because of the principal's incapacity, and in the other because of the illegality of the act. An infant, for instance, cannot, as a rule, empower an agent or attorney to act for him, and therefore he cannot ratify what another has assumed to do in his name as an agent or attorney. He cannot affirm what he could not authorize.³⁰

(5) A person in ratifying a contract thus made by another on his behalf, but without authority, may, as in the acceptance of any other simple contract, signify his assent by words or by conduct. He may expressly declare his responsibility for the act of his agent,³¹ or he may accept the benefit of it, and thereby impliedly assent,³² or may otherwise impliedly assent by acquiescence in what has been done.³³ A ratification, to be effectual, must be with a full knowledge of all the material facts.³⁴ Where conduct is relied upon as constituting ratifi-

14 Am. Rep. 106. For a collection of the cases pro and con, see *Henry v. Heeb*, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613.

³⁰ *Armitage v. Widoe*, 36 Mich. 124; *TRUEBLOOD v. TRUEBLOOD*, 8 Ind. 195, 65 Am. Dec. 756; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

³¹ *Bigelow v. Denison*, 23 Vt. 564.

³² *Coykendall v. Constable*, 99 N. Y. 309, 1 N. E. 309; *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. 891; *Conant v. Canal Co.*, 29 Vt. 263; *Miles v. Ogden*, 54 Wis. 573, 12 N. W. 81; *Hall v. White*, 123 Pa. 95, 16 Atl. 521; *Eikenberry v. Edwards*, 67 Iowa, 14, 24 N. W. 570, 56 Am. Rep. 360; *Shoninger v. Peabody*, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88; *Logan Co. Nat. Bank v. Townsend (Ky.)* 3 S. W. 122; *Murray v. Mayo*, 157 Mass. 248, 31 N. E. 1063; *United States Mortgage Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88; *Taylor v. Conner*, 41 Miss. 722, 97 Am. Dec. 419; *Ehrmanntraut v. Robinson*, 52 Minn. 333, 54 N. W. 188; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728.

³³ *Alexander v. Jones*, 64 Iowa, 207, 19 N. W. 913; *Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650; *Sheldon Hat Blocking Co. v. Machine Co.*, 90 N. Y. 610; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300; *Pope v. Henry*, 24 Vt. 560; *Hawkins v. Lange*, 22 Minn. 557; *Lathrop v. Bank*, 8 Dana (Ky.) 114, 33 Am. Dec. 481; *Cooper v. Schwartz*, 40 Wis. 54; *Merrill v. Wilson*, 66 Mich. 232, 33 N. W. 716; *Burke v. Railway Co.*, 83 Wis. 410, 53 N. W. 692.

³⁴ *Combs v. Scott*, 12 Allen (Mass.) 493; *Saville, Simes & Co. v. Welch*, 58 Vt. 683, 5 Atl. 491; *Wheeler v. Sleigh Co. (C. C.)* 39 Fed. 347; *Roberts v. Rumley*, 58 Iowa, 301, 12 N. W. 323; *King v. Mackellar*, 109 N. Y. 215, 16 N. E. 201; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235; *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 908; *Taliaferro v. Bank*, 71 Md. 200, 17 Atl. 1036; *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Stout v. McLauchlin*, 38 Kan. 120, 15 Pac. 902; *Kelley v. Railroad Co.*, 141 Mass. 496, 6 N. E. 745; *Hovey v. Brown*, 59 N. H. 114; *Herring v. Skaggs*, 73 Ala. 446; *Merrick Thread Co. v. Manufacturing Co.*, 115 Pa. 314, 8 Atl. 794; *Ladd v. Hildebrandt*, 27 Wis. 135, 9 Am. Rep. 445; *Woodruff v. Railroad Co.*, 108 N. Y. 39, 14 N. E. 832; *Manning v. Gasbarie*, 27 Ind. 399; *Gulick v. Grover*, 33 N. J. Law, 463, 97 Am. Dec. 728; *Eggleston*

cation, the relations of the parties and their ordinary course of dealing may be of weight.

As we have seen, a contract under seal cannot be entered into by an agent unless his authority is under seal; and so, where a person has assumed to enter into a contract under seal for another without authority, the latter cannot ratify it by parol. He may probably, by recognizing and carrying it into effect, make it binding upon him as a parol contract, but he cannot, by parol ratification, make it his deed.³⁵ Where appointment of an agent to make a particular contract is required by statute to be in writing, such a contract entered into without authority cannot be ratified without writing.³⁶ "If sealed authority was indispensable, sealed ratification must be shown; and, if written authority was required, written ratification must appear."³⁷ If parol authority is sufficient, ratification may be by parol.³⁸

(6) If the principal elects to ratify the unauthorized contract of his agent, he must ratify it as the agent made it. No rule is better settled

v. Mason, 84 Iowa. 630, 51 N. W. 1; *Shoninger v. Peabody*, 59 Conn. 588, 22 Atl. 437. "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. * * * We do not mean to say that a person can be willfully ignorant, or purposely shut his eyes to means of information within his own possession and control, and thereby escape the consequences of a ratification of unauthorized acts into which he has deliberately entered; but our opinion is that ratification of an antecedent act of an agent which was unauthorized cannot be held valid and binding where the person sought to be charged has misapprehended or mistaken material facts, although he may have wholly omitted to make inquiries of other persons concerning them, and his ignorance and misapprehension might have been enlightened and corrected by the use of diligence on his part to ascertain them." *Combs v. Scott*, supra. Mistake of law—as to the legal effect of the contract, for instance—does not render a ratification ineffectual. *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. 891; *Kelley v. Railroad Co.*, 141 Mass. 496, 6 N. E. 745; *Craighead v. Peterson*, 72 N. Y. 279, 28 Am. Rep. 150.

³⁵ *Hanford v. McNair*, 9 Wend. (N. Y.) 54; *Heath v. Nutter*, 50 Me. 378; *Blood v. Goodrich*, 12 Wend. (N. Y.) 525, 27 Am. Dec. 152; *Hunter v. Parker*, 7 Mees. & W. 343; *Boyd v. Dobson*, 5 Humph. (Tenn.) 37; *Pollard v. Gibbs*, 55 Ga. 45; *McCalla v. Mortgage Co.*, 90 Ga. 113, 15 S. E. 687; *Stetson v. Patten*, 2 Greenl. (Me.) 358, 11 Am. Dec. 111; *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611. Contra (parol ratification sufficient), *McIntyre v. Park*, 11 Gray (Mass.) 102, 71 Am. Dec. 690. That parol ratification by a partner is good, see *Drumright v. Philpot*, 16 Ga. 424, 60 Am. Dec. 738.

³⁶ *Hawkins v. McGroarty*, 110 Mo. 546, 19 S. W. 830; *Palmer v. Williams*, 24 Mich. 328; *Ragan v. Chenault*, 78 Ky. 546.

³⁷ *Mechem*, Ag. § 136.

³⁸ *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89.

than the rule that he cannot ratify a part of the contract and repudiate the rest. If he ratifies a part, he ratifies the whole.³⁹

EFFECT OF THE RELATION.

Having considered the various modes in which the relation of principal and agent may be created, we must now deal shortly with the effects of that relation. In doing so we will consider (1) the rights and liabilities of the principal and agent inter se; (2) the rights and liabilities of the parties where an agent contracts as agent for a named principal; and (3) the rights and liabilities of the parties where an agent contracts for a principal whose name or whose existence he does not disclose.

SAME—RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT INTER SE.

272. The duties of the principal are:

- (a) To pay the agent the commission or reward agreed upon.
- (b) To indemnify the agent for acts lawfully done in the execution of his authority.

273. The duties of the agent are:

- (a) To account to the principal for the property of the latter which comes into his hands in the course of the employment.
- (b) To obey instructions, to use ordinary diligence in the discharge of his duties, to employ any special skill or capacity which he may profess for the work in hand, and to notify his employer of circumstances which he ought to know.
- (c) To make no profit other than the commission or reward promised, either—
 - (1) By taking reward from others, or
 - (2) By becoming principal as against his employer.
- (d) As a rule, an agent cannot delegate his powers.

The relations of principal and agent inter se are made up of the ordinary relations of employer and employed, and of those which spring from the special business of an agent to bring two parties together for the purpose of making a contract,—to establish privity of contract between his employer and third parties.

³⁹ Eberts v. Selover, 44 Mich. 519, 7 N. W. 225, 38 Am. Rep. 278; McClure v. Briggs, 58 Vt. 82, 2 Atl. 583, 56 Am. Rep. 557; Brigham v. Palmer, 3 Allen (Mass.) 450; Wheeler & Wilson Mfg. Co. v. Aughey, 144 Pa. 398, 22 Atl. 667, 27 Am. St. Rep. 638; Taylor v. Conner, 41 Miss. 722, 97 Am. Dec. 419; Shoninger v. Peabody, 57 Conn. 42, 17 Atl. 278, 14 Am. St. Rep. 88; Esterly Harvesting Mach. Co. v. Frolkey, 34 Neb. 110, 51 N. W. 594; Walker v. Haggerty, 30 Neb. 120, 46 N. W. 221; Daniels v. Brodie, 54 Ark. 216, 15 S. W. 467, 11 L. R. A. 81; Rudasill v. Falls, 92 N. C. 222.

Duties of Principal.

The duties of the principal are plain. In the first place, he is bound to pay the agent such commission or reward for the employment as may have been agreed upon between them, provided the agent has not, by his conduct, forfeited the right to compensation. If the agent is guilty of fraud or breach of his duty, he may forfeit his right in this respect; just as the breach of any other contract by one of the parties may discharge the other.⁴⁰

The principal is further bound to indemnify the agent for acts lawfully done in the execution of his authority.⁴¹ The acts, however, must be lawfully done, at least in so far as the agent is concerned; for, as we have already seen, a promise of indemnity for unlawful acts is illegal, and will not support an assumpsit.⁴²

Duties of the Agent.

The agent is bound, like every person who enters into a contract of employment, to account for the property of his employer which comes into his hands in the course of the employment. The law implies a promise to account within a reasonable time and without demand, and for a breach thereof an action of assumpsit will lie.⁴³ This does not apply, so as to dispense with the necessity for demand, where the agent has faithfully performed his duty by giving his principal timely notice that he has received money or other property on his account.⁴⁴

It is also the duty of the agent to obey instructions, to use ordinary diligence in the discharge of his duties, to display any special skill or capacity which he may have professed for the work in hand, and to

⁴⁰ *Vennum v. Gregory*, 21 Iowa, 326; *Shaeffer v. Blair*, 149 U. S. 248, 13 Sup. Ct. 856, 37 L. Ed. 721; *Sea v. Carpenter*, 16 Ohio, 412; *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207. As to lien of agent for compensation, see *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259; *McKenzie v. Nevins*, 22 Me. 138, 38 Am. Dec. 291; *Farrington v. Meek*, 30 Mo. 578, 77 Am. Dec. 627; *Vinton v. Baldwin*, 95 Ind. 433.

⁴¹ *D'Arcy v. Lyle*, 5 Bin. (Pa.) 441; *Howe v. Railroad Co.*, 37 N. Y. 297; *Chamberlain v. Beller*, 18 N. Y. 115; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; *Ruffner v. Hewitt*, 7 W. Va. 585; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Maitland v. Martin*, 86 Pa. 120.

⁴² *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376. If one request or direct another to do an act which the latter knows at the time will be a trespass, and promise to indemnify him, the promise is void; but if the party who does the act at the instance or by the command of another does not know at the time that he is committing a trespass, and is not charged by law with knowledge, the promise to indemnify is valid. *Coventry v. Barton*, *supra*; *Moore v. Appleton*, 26 Ala. 633; *Drummond v. Humphreys*, 39 Me. 347; *Gower v. Emery*, 18 Me. 79.

⁴³ *Clark v. Moody*, 17 Mass. 145; *Lillie v. Hoyt*, 5 Hill (N. Y.) 395, 40 Am. Dec. 360; *Wiley v. Logan*, 96 N. C. 510, 2 S. E. 598; *Collins v. Tillou's Adm'r*, 26 Conn. 368, 68 Am. Dec. 398; *Placer Co. v. Astin*, 8 Cal. 303.

⁴⁴ *Jett v. Hempstead*, 25 Ark. 462.

give his principal timely notice of every fact or circumstance which may make it necessary for him to take measures for his security. A breach of this duty is a breach of contract, for which the agent is liable to the principal in damages.⁴⁵

An agent is bound not to make any profit out of transactions into which he may enter on behalf of his principal in the course of the employment, other than the reward or commission agreed upon between them. A breach of this duty may take place (1) by his accepting a reward from the other party to the transaction into which he enters; or (2) by departing from his character as agent, and assuming that of principal,—becoming, for instance, the buyer of that which he is employed to sell, or the seller of that which he is employed to buy. The first transaction is obviously fraudulent, for the agent is virtually bribed to make a bad bargain for his principal; but the other is not necessarily so. In both, however, the agent acquires an interest adverse to that of his employer, and this will never be permitted, for it tends to fraud and breach of trust.⁴⁶

Where an agent, therefore, is promised a reward by the other party to the transaction in which he is engaged for his principal, or otherwise makes a bargain which might induce him to act disloyally to his principal, he cannot recover the money promised him.⁴⁷ The promise is illegal and void. It is immaterial in such a case that the principal was not actually injured, for the tendency of the contract renders it corrupt and unenforceable. Further than this, the agent, if he is paid the money thus promised him, or otherwise obtains a profit by a transaction of this nature, is bound to account for it to his employer; or, if there is no account remaining to be taken and adjusted between him and his employer, he is bound to pay over the amount as money absolutely belonging to his employer.⁴⁸

The courts are strict in holding that an agent cannot depart from his character as agent, and become principal party to the transaction, even though his change of attitude does not result in injury to his

⁴⁵ *Bell v. Cunningham*, 3 Pet. 69, 7 L. Ed. 606; *Whitney v. Express Co.*, 104 Mass. 152, 6 Am. Rep. 207; *Scott v. Rogers*, 31 N. Y. 676; *Page v. Wells*, 37 Mich. 415; *Passano v. Acosta*, 4 La. 26, 23 Am. Dec. 470; *Sawyer v. Mayhew*, 51 Me. 398; *Lavery v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Devall v. Burbridge*, 4 Watts & S. (Pa.) 305; *Babcock v. Orbison*, 25 Ind. 75; *Hall v. Railroad Co.*, 15 Ind. 362; *Morrison v. Orr*, 3 Stew. & P. (Ala.) 49, 23 Am. Dec. 319; *Geisse v. Franklin*, 56 Conn. 83, 13 Atl. 148; *Redfield v. Davis*, 6 Conn. 439; *Bowerman v. Rogers*, 125 U. S. 585, 8 Sup. Ct. 986, 31 L. Ed. 815; *Clark v. Bank*, 17 Pa. 322.

⁴⁶ Ante, p. 301.

⁴⁷ *Harrington v. Dock Co.*, 3 Q. B. Div. 548; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385.

⁴⁸ *Morison v. Thompson*, L. R. 9 Q. B. 480; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Smitz v. Leopold*, 51 Minn. 455, 53 N. W. 719.

principal.⁴⁹ If, for instance, a person is employed to buy or sell, he cannot buy from, or sell to, himself.⁵⁰ Nor, if he is employed to bring his principal into contractual relations with others in any way, can he assume the position of the other contracting party.⁵¹ This rule arises from the fiduciary relation of principal and agent. The agent is bound to do the best he can for his principal, and, if he thus assumes a position in direct antagonism to his duty, it is difficult to suppose that the special knowledge on the strength of which he was employed is not exercised to the disadvantage of his principal. Not only, therefore, can he not assume such an antagonistic position directly, but he cannot do so indirectly. If an agent employed to effect a sale of property purchase it nominally for another, but really for himself, the purchase cannot be enforced.⁵² In no case is it any answer to say that everything was fair, and that the principal was not prejudiced. It is enough that the agent's interest was adverse to that of his principal. "The law does not stop," it has been said in reference to an agent's purchase for himself, "to speculate upon the probabilities that the agent has resisted temptation; it removes the temptation by proclaiming in advance that he shall not acquire the property."⁵³

As a rule, an agent cannot delegate his authority,—that is, he cannot depute to another to do that which he has undertaken to do;⁵⁴ but the

⁴⁹ *People v. Board*, 11 Mich. 222; *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541. And see the cases hereafter cited.

⁵⁰ *Bain v. Brown*, 56 N. Y. 285; *Taussig v. Hart*, 58 N. Y. 425; *Conkey v. Bond*, 36 N. Y. 427; *Ellsworth v. Cordrey*, 63 Iowa, 675, 16 N. W. 211; *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415; *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Florance v. Adams*, 2 Rob. (La.) 556, 38 Am. Dec. 226; *Keighler v. Manufacturing Co.*, 12 Md. 383, 71 Am. Dec. 600; *Jansen v. Williams*, 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Tewksbury v. Spruance*, 75 Ill. 187; *Cottom v. Holliday*, 59 Ill. 176; *Collins v. Rainey*, 42 Ark. 531; *Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203; *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Ames v. Booming Co.*, 11 Mich. 139, 83 Am. Dec. 731; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262; *Moseley's Adm'rs v. Buck*, 3 Muf. (Va.) 232, 5 Am. Dec. 508; *Kerfoot v. Hyman*, 52 Ill. 512.

⁵¹ *McPherson v. Watt*, 3 App. Cas. 254; *Moore v. Mandlebaum*, 8 Mich. 433; *Merryman v. David*, 31 Ill. 404; *People v. Board*, 11 Mich. 222; *Segar v. Edwards*, 11 Leigh (Va.) 213; *Stewart v. Mather*, 32 Wis. 344; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Butcher v. Krauth*, 14 Bush (Ky.) 713; *McKinley v. Irvine*, 13 Ala. 681.

⁵² *McPherson v. Watt*, 3 App. Cas. 254.

⁵³ *Moore v. Moore*, 5 N. Y. 256; *People v. Board*, 11 Mich. 222; *Rockford Watch Co. v. Manifold*, 36 Neb. 801, 55 N. W. 236; *Colbert v. Shepherd*, 89 Va. 401, 16 S. E. 246.

⁵⁴ "The rule of law is well settled that in the absence of any authority, either express or implied, to employ a subagent, the trust committed to an agent is exclusively personal, and cannot be delegated by him to another, so as to affect the rights of the principal. In such case, if the agent employs

rule is subject to limitations. "As a general rule, no doubt, the maxim, 'Delegatus non potest delegare,' applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analyzed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfill, and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract."⁵⁵ As pointed out, however, in the case from which we have quoted, there are occasions when such authority must needs be implied, —occasions springing from the conduct of the parties, the usage of a trade, the nature of a business, or an unforeseen emergency; and "when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself."⁵⁶ But where there is no such implied authority, and the agent employs a subagent for his own convenience, no privity of contract arises between the principal and the subagent. In the absence of special circumstances giving rise to implied authority, an agent can never delegate any portion of his power requiring the exercise of discretion or judgment, so as to render the acts of his delegate binding on the principal;⁵⁷ but he may delegate such powers and duties as are merely ministerial or mechanical in their nature.⁵⁸ If an agent, for instance, is empowered to bind his principal by an ac-

a substitute, he does it at his own risk and upon his own responsibility. The agent only is liable to the principal, and the subagent is responsible solely to his immediate employer; nor can the principal be liable for the acts of the subagent. There is no privity between them upon which any mutual rights and remedies can be based." *APPLETON BANK v. MCGILVRAY*, 4 Gray (Mass.) 518, 64 Am. Dec. 92.

⁵⁵ *De Bussche v. Alt*, 8 Ch. Div. 310.

⁵⁶ *De Bussche v. Alt*, 8 Ch. Div. 310; *APPLETON BANK v. MCGILVRAY*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Darling v. Stanwood*, 14 Allen (Mass.) 504; *Johnson v. Cunningham*, 1 Ala. 249; *McCants v. Wells*, 4 S. C. 381.

⁵⁷ *Warner v. Martin*, 11 How. 223, 13 L. Ed. 667; *Hunt v. Douglass*, 22 Vt. 128; *Lyon v. Jerome*, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *Exchange Nat. Bank v. Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722; *Emerson v. Manufacturing Co.*, 12 Mass. 237, 7 Am. Dec. 66; *Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264; *O'Conner v. Arnold*, 53 Ind. 203; *Barnard v. Coffin*, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443; *Hoag v. Graves*, 81 Mich. 628, 46 N. W. 109; *Bocoek v. Pavey*, 8 Ohio St. 270; *Bennitt v. The Guiding Star* (D. C.) 53 Fed. 936; *Loeb v. Drakeford*, 75 Ala. 464; *Sayre v. Nichols*, 7 Cal. 535, 68 Am. Dec. 280; *Loomis v. Simpson*, 13 Iowa, 532.

⁵⁸ *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501; *Bodine v. Insurance Co.*, 51 N. Y. 123, 10 Am. Rep. 566; *Grady v. Insurance Co.*, 60 Mo. 116; *Harralson*

commodation acceptance, he cannot delegate to another the power to determine the propriety of the acceptance, but, having determined this question himself, he may empower another to write the acceptance, and it will bind the principal, though naming the delegate, and not the agent, as the one exercising the power.⁵⁹

**SAME—RIGHTS AND LIABILITIES AS TO THIRD PERSONS—
NAMED PRINCIPAL.**

- 274. Where an agent contracts as agent for a principal who is named,**
- (a) **The party with whom the contract is made is liable to the principal directly.**
 - (b) **The principal is liable directly to the party with whom the contract is made—**
 - (1) **If the agent acted within the scope of his actual authority.**
 - (2) **If the agent acted within an apparent authority with which he was clothed by the principal, though contrary to private instructions and limitations not known to the other party.**
 - (c) **The agent cannot sue in his own name on the contract except—**
 - (1) **Where he is the real principal, though named as agent.**
 - (2) **Where he has a special interest in the subject-matter of the contract.**
 - (d) **The agent cannot be sued on the contract except—**
 - (1) **Where the contract is under seal, and he has made himself a party to it.**
 - (2) **In some jurisdictions, where he contracted for a foreign principal.**
 - (3) **Where he has exceeded his authority, or has contracted without any authority at all, he is liable in tort. In some jurisdictions he is liable ex contractu on an implied warranty of authority.**
 - (4) **Where the contract was really made with him personally, though he is described as agent.**

Where an agent, duly authorized, contracts as agent for a named principal, or, in other words, where the other party to the contract looks through the agent to a principal who is disclosed, the agent drops out of the transaction, if he keeps within his authority, as soon as the contract is made. The principal, and he alone, becomes directly liable to the other party, and the latter becomes directly liable to the principal, and to him alone.⁶⁰ Where the transaction takes this form, only two matters arise for discussion: (1) The nature and extent of

v. Stein, 50 Ala. 347; *Eldridge v. Holway*, 18 Ill. 445; *Williams v. Woods*, 16 Md. 220.

⁵⁹ *Commercial Bank v. Norton*, 1 Hill (N. Y.) 501.

⁶⁰ *Hall v. Huntton*, 17 Vt. 244, 44 Am. Dec. 332; *Rathbon v. Budlong*, 15 Johns. (N. Y.) 1; *Woodbridge Tp. v. Hall*, 47 N. J. Law. 388, 1 Atl. 492; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Seery v. Socks*, 29 Ill. 313; *Michael v. Jones*, 84 Mo. 578; and cases hereafter cited.

the agent's authority; and (2) the rights of the parties where an agent exceeds his authority.

"Much trouble has been taken to distinguish general from special agents, as having two sorts of authority, different in kind from one another; but one may safely say that such a difference is one of degree only."⁶¹ Whether the authority was general or special can make no difference except in determining whether the agent exceeded his authority. If the contract into which he has entered was within or without his authority, the effect is the same in either case.⁶² If a person employs another specially to buy a horse for him, or to do any other single piece of business, the latter has authority to do whatever is necessary to accomplish that object; but he cannot bind his principal by a contract foreign to the particular object.⁶³ If a person employs another generally to manage and conduct his business, the latter may bind his principal by any contracts necessary or proper in the conduct of that business, but he cannot bind him by contracts foreign to the business.⁶⁴ These cases differ in nothing but the extent of the authority given. The extent of the authority is determined in both cases according to the general rule that the scope of an agent's authority is to be measured by the nature and necessities of the thing to be accomplished. There is no difference in kind between the cases. In neither of them does the agent incur any personal liability to any one with whom he contracts, so long as he contracts as agent, names his principal, and keeps within the limits of his authority.

The acts of a general agent, known as such, govern his principal in

⁶¹ Anson, *Cont.* (4th Ed.) 344.

⁶² *Butler v. Maples*, 9 Wall. 766, 19 L. Ed. 822; *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 516; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Hatch v. Taylor*, 10 N. H. 538; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; *Loudon Sav. Fund Soc. v. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Piercy v. Hedrick*, 2 W. Va. 458, 98 Am. Dec. 774.

⁶³ *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Law v. Stokes*, 32 N. J. Law, 249, 90 Am. Dec. 655; *Moore v. Lockett*, 2 Bibb. (Ky.) 67, 4 Am. Dec. 683; *Loudon Sav. Fund Soc. v. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Huber v. Zimmerman*, 21 Ala. 488, 56 Am. Dec. 255; *Goodloe v. Godley*, 13 Smedes & M. (Miss.) 233, 51 Am. Dec. 150; *Reitz v. Martin*, 12 Ind. 306, 74 Am. Dec. 215; *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Paige v. Stone*, 10 Metc. (Mass.) 160, 43 Am. Dec. 420; *Baring v. Peirce*, 5 Watts & S. (Pa.) 548, 40 Am. Dec. 534; *Brown v. Johnson*, 12 Smedes & M. (Miss.) 398, 51 Am. Dec. 118; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; *Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424; *Trudo v. Anderson*, 10 Mich. 357, 81 Am. Dec. 795.

⁶⁴ Notes 65, 67, 68, *infra*; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; *Trout v. Emmons*, 29 Ill. 433, 81 Am. Dec. 326; *Cooley v. Willard*, 34 Ill. 68, 85 Am. Dec. 296; *Brockway v. Mullin*, 46 N. J. Law, 448, 50 Am. Rep. 442; *Despatch Line v. Manufacturing Co.*, 12 N. H. 205, 37 Am. Dec. 203.

all matters coming within the proper and legitimate scope of the business to be transacted, although he violates by these acts his private instructions; for his authority cannot be limited by any private instructions, unless known to the person dealing with him.⁶⁵

If the agency is special, and is known, it is the duty of the person dealing with the agent to inquire into the nature and extent of the authority conferred, and to deal with the agent accordingly.⁶⁶ Where the special character of the agency is not known, and the principal has clothed the agent with apparent powers, strangers, in dealing with the agent, may assume that such apparent powers are possessed. The principal cannot, by private communications with his agent, limit the authority which he allows the agent to assume.⁶⁷ "There are two cases in which a principal becomes liable for the acts of his agent,—one, where the agent acts within the limits of his authority; the other, where he transgresses the actual limits, but acts within the apparent limits, of his authority, where those apparent limits have been sanctioned by the principal."⁶⁸

⁶⁵ *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808; *Whitehead v. Tuckett*, 15 East, 400; *Hatch v. Taylor*, 10 N. H. 538; *Hubbard v. Ten Brook*, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; *Loudon Sav. Fund Soc. v. Bank*, 36 Pa. 498, 78 Am. Dec. 390; *Lightbody v. Insurance Co.*, 23 Wend. (N. Y.) 18; *Munn v. Commission Co.*, 15 Johns. (N. Y.) 44, 8 Am. Dec. 219; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Lobdell v. Baker*, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476; *Walker v. Skipwith*, Meigs (Tenn.) 502, 33 Am. Dec. 161; *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 757; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Sails v. Miller*, 98 Mo. 478, 11 S. W. 970; *Topham v. Roche*, 2 Hill (S. C.) 307, 27 Am. Dec. 387; *Hubbard v. Ten Brook*, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; *Banks v. Everest*, 35 Kan. 687, 12 Pac. 141.

⁶⁶ *Hatch v. Taylor*, 10 N. H. 538; *Snow v. Perry*, 9 Pick. (Mass.) 539; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494, 24 Am. Dec. 62; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Ruppe v. Edwards*, 52 Mich. 411, 18 N. W. 193; *Dowden v. Cryder* (N. J. Err. & App.) 26 Atl. 941; *Bobart v. Oberne*, 36 Kan. 284, 13 Pac. 388; *Stovall v. Commonwealth*, 84 Va. 246, 4 S. E. 379; *Yates v. Yates*, 24 Fla. 64, 3 South. 821.

⁶⁷ *Hamill v. Ashley*, 11 Colo. 180, 17 Pac. 502; *Jackson v. Emmens*, 119 Pa. 356, 13 Atl. 210; *Shaw v. Williams*, 100 N. C. 272, 6 S. E. 196; *Howell v. Graff*, 25 Neb. 130, 41 N. W. 142; *Hayner v. Churchill*, 29 Mo. App. 676. And see cases in the following note, and in notes 64, 65, *supra*.

⁶⁸ *Maddiek v. Marshall*, 16 C. B. (N. S.) 393; *Law v. Stokes*, 32 N. J. Law, 249; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78; *Bryant v. Moore*, 26 Me. 84, 45 Am. Dec. 96; *Williams v. Mitchell*, 17 Mass. 98; *Breckenridge v. Lewis*, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353; *Talmage v. Bierhouse*, 103 Ind. 270, 2 N. E. 716; *Hatch v. Taylor*, 10 N. H. 538; *Gallinger v. Traffic Co.*, 67 Wis. 529, 30 N. W. 790; *Aldrich v. Wilmarth* (S. D.) 54 N. W. 811; *Palmer v. Roath*, 86 Mich. 602, 49 N. W. 590; *Williams v. Getty*, 31 Pa. 461, 72 Am. Dec. 757; *Winchell v. Express Co.*, 64 Vt. 15, 23 Atl. 728; *Barnett v. Glutting*, 3 Ind. App. 415, 29 N. E. 927; *Allis v. Voigt*, 90 Mich. 125, 51 N. W. 190;

In like manner, as we have seen, an implied authority may be deduced from the nature and circumstances of the particular act done by the principal. If a principal sends his commodity, for instance, to a place where it is the ordinary business of the person to whom it is confided to sell, it will be presumed that the article is sent for the purpose of sale; and where an article is sent in such a way, and to such a place, as to exhibit an apparent purpose of sale, the principal will be bound by a sale by his agent, though the latter, unknown to the purchaser, may have exceeded his actual authority.⁶⁹

It may be well for us to note shortly the amount of authority with which certain kinds of agents are invested in the ordinary course of their employment.

An auctioneer is an agent to sell goods at a public auction. He is primarily an agent for the seller, but, upon the goods being knocked down, he becomes also the agent of the buyer; and he is so, as we have seen, for the purpose of the signatures of both parties, to satisfy the statute of frauds. He has not merely an authority to sell, but actual possession of, the goods, and a lien upon them for his charges. He may sue the purchaser in his own name,⁷⁰ and even where he contracts avowedly as agent, and for a known principal, he may introduce terms into the contract which he makes with the buyer, so as to render himself personally liable.⁷¹

A factor, by the rules of common law and of mercantile usage, is an agent to whom goods are consigned for the purpose of sale, and he has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale. He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer.⁷² He further has a lien upon the goods for the balance of account as between himself and his principal, provided he has possession of the goods, and the right of property in them is in his prin-

Carmichael v. Buck, 10 Rich. (S. C.) 332, 70 Am. Dec. 226; *Ayer v. Manufacturing Co.*, 147 Mass. 46, 16 N. E. 754; *Mason v. Taylor*, 38 Minn. 32, 35 N. W. 474.

⁶⁹ *Ante*, p. 501; *Towle v. Leavitt*, 23 N. H. 373, 55 Am. Dec. 195; *Pickering v. Busk*, 15 East, 38; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Sandford v. Handy*, 23 Wend. (N. Y.) 260.

⁷⁰ *Hulse v. Young*, 16 Johns. (N. Y.) 1; *Minturn v. Main*, 7 N. Y. 220; *Beller v. Block*, 19 Ark. 566; *Walker v. Herring*, 21 Grat. (Va.) 678, 8 Am. Rep. 616; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Brent v. Green*, 6 Leigh (Va.) 16.

⁷¹ *Wolfe v. Horne*, 2 Q. B. Div. 355.

⁷² *Dwight v. Whitney*, 15 Pick. (Mass.) 179; *Slack v. Tucker*, 23 Wall. 321, 23 L. Ed. 143; *Hutchinson v. Bouers*, 6 Cal. 383; *James v. McCredie*, 1 Bay (S. C.) 294; *Given v. Lemoine*, 35 Mo. 110; *Van Alen v. Vanderpool*, 6 Johns. (N. Y.) 69, 5 Am. Dec. 192; *Pinkham v. Crocker*, 77 Me. 563, 1 Atl. 827; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *McConnico v. Curzen*, 2 Call. (Va.) 358, 1 Am. Dec. 540.

cial. If he voluntarily relinquishes possession, he loses his right to a lien.⁷³ He also has an insurable interest in the goods. Such is the authority of a factor at common law,—an authority which the principal cannot restrict, as against third parties, by instructions privately given to his agent. This authority has been extended by statute in some jurisdictions.

A broker is an agent primarily to establish privity of contract between two parties. Where he is a broker for sale, he has not possession of the goods, and so he has not the authority thence arising which a factor enjoys. Nor has he authority to sue in his own name on contracts made by him.

A *del credere* agent is an agent for the purpose of sale, but in addition to this he gives an undertaking to his employer that the parties with whom he is brought into contractual relations will perform the engagements into which they enter. He does not guaranty the solvency of these parties, or promise to answer for their default, but he promises to indemnify his employer against his own inadvertence or ill fortune in making contracts for him with persons who cannot or will not perform them.⁷⁴

Rights and Liabilities of Agent.

As a rule, an agent cannot sue in his own name on a contract into which he has entered, as agent, for a named principal.⁷⁵ The party with whom he contracted has presumably looked to the named principal, and cannot, unless he so chooses, be made liable to one with whom he dealt merely as a means of communication. To this rule there are exceptions: (1) Where the agent is the real principal; and (2) where he has a special interest in the subject-matter of the contract. Where the agent is the real principal, and the party with whom he contracts knows of this fact, and deals with him as the real principal, he may sue on the contract in his own name, although he signed

⁷³ *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522; *Elliot v. Bradley*, 23 Vt. 217; *Vail v. Durant*, 7 Allen (Mass.) 408, 83 Am. Dec. 695; *Weed v. Adams*, 37 Conn. 378; *Gibson v. Stevens*, 8 How. 384, 12 L. Ed. 1123; *Gragg v. Brown*, 44 Me. 157; *Brown v. Combs*, 63 N. Y. 598; *Schiffer v. Feagin*, 51 Ala. 335; *Brown v. Wiggin*, 16 N. H. 312; *Winne v. Hammond*, 37 Ill. 99; *Eaton v. Truesdail*, 52 Ill. 307.

⁷⁴ *Dalton v. Goddard*, 104 Mass. 497; *Bradley v. Richardson*, 23 Vt. 720; *Swan v. Nesmith*, 7 Pick. (Mass.) 220, 19 Am. Dec. 283; *Holbrook v. Wright*, 24 Wend. (N. Y.) 169; *Smock v. Brush*, 62 Ind. 156; *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190; *Coulurier v. Hastie*, 8 Exch. 40; *Grove v. Dubois*, 1 Term R. 112.

⁷⁵ *Gunn v. Cantine*, 10 Johns. (N. Y.) 387; *Gilmore v. Pope*, 5 Mass. 491; *Jones v. Hart*, 1 Hen. & M. (Va.) 470; *Inhabitants of Garland v. Reynolds*, 20 Me. 45; *Kent v. Bornstein*, 12 Allen (Mass.) 342. But it has been held otherwise where the contract was payable to the agent by name. *Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359; *Doe v. Thompson*, 22 N. H. 217.

the contract as agent of a named principal.⁷⁶ It has also been held that an agent, such as a factor or auctioneer, who has a special interest in the contract, as for commissions, may sue thereon in his own name.⁷⁷

It is also a general rule that an agent who contracts, as agent, for a named principal, cannot be sued on the contract;⁷⁸ and there are very few exceptions to the rule. The first exception is in case of contracts under seal. An agent who makes himself a party to a contract under seal is bound thereby at common law, though he is described as agent.⁷⁹

Another exception is where an agent contracts for a foreign principal. It has been held in England, and in some of our states, that an agent who contracts on behalf of a foreign principal is held, by the usage of merchants, to have no authority to pledge his principal's credit, and becomes personally liable on the contract.⁸⁰ In New York the contrary has been held.⁸¹ Probably in no state would a sister state be regarded as a foreign country within the rule.⁸²

When a person without authority makes a contract on behalf of another, the latter is not bound unless he ratifies the contract. If the professed agent contracts in his own name he is, of course, personally liable on the contract. If, however, he contracts in the name of the ostensible principal, the professed agent is not liable on the contract, because it does not purport to be his, and to hold him liable on it would be to make a contract, not to construe it.⁸³ This rule is sustained by

⁷⁶ *Raynor v. Grote*, 15 Mees. & W. 359.

⁷⁷ *Baltimore & P. Steamboat Co. v. Atkins*, 22 Pa. 522; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Whitehead v. Potter*, 26 N. C. 257; *Toland v. Murray*, 18 Johns. (N. Y.) 24.

⁷⁸ *Jefts v. York*, 4 Cush. (Mass.) 371, 50 Am. Dec. 791; *McCurdy v. Rogers*, 21 Wis. 199, 91 Am. Dec. 468; *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332; *Lehman v. Feld* (C. C.) 37 Fed. 852; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429; *Bailey v. Cornell*, 66 Mich. 107, 33 N. W. 50.

⁷⁹ *BECKHAM v. DRAKE*, 9 Mees. & W. 95; *Lutz v. Linthicum*, 8 Pet. 165, 8 L. Ed. 904; *Fullam v. Inhabitants of West Brookfield*, 9 Allen (Mass.) 1; *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *White v. Skinner*, 13 Johns. (N. Y.) 307; *Hancock v. Yunker*, 83 Ill. 208; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280.

⁸⁰ *Armstrong v. Stokes*, L. R. 7 Q. B. 605; *Rogers v. March*, 33 Me. 106; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *New Castle Mfg. Co. v. Railroad Co.*, 1 Rob. (La.) 145, 36 Am. Dec. 686; *Merrick's Estate*, 5 Watts & S. (Pa.) 9.

⁸¹ *Kirkpatrick v. Stainer*, 22 Wend. 244; *Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534; *Bray v. Kettell*, 1 Allen (Mass.) 80.

⁸² *Vawter v. Baker*, 23 Ind. 63; *Barham v. Bell*, 112 N. C. 131, 16 S. E. 903. But see *Barry v. Page*, 10 Gray (Mass.) 398.

⁸³ *Jenkins v. Hutchinson*, 13 Q. B. 744; *Lewis v. Nicholson*, 18 Q. B. 503; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Noyes v. Loring*, 55 Me. 408; *White v. Madison*, 26 N.

principle and authority, though there are some decisions which hold him liable on the contract.⁸⁴ The remedy of the third person who contracts with the professed agent in reliance upon the authority which he asserts, but does not possess, must, therefore, be sought in some other form of action than an action on the contract. If the agent fraudulently represents that he is authorized when he is not, he is, upon familiar principles, liable in an action of tort, for deceit; and this, whether the representation of authority is express or is merely implied from his assuming to act as one having authority.⁸⁵ On the other hand, if he honestly but mistakenly believes that he has authority, he is not liable in an action of deceit. The effect of the foregoing doctrines being to leave a person who enters into a contract with another as agent without remedy where the professed agent has acted under a mistaken belief that he has authority, as in the case of a supposed agent acting under a forged power of attorney, which he believes to be genuine, has led the courts to resort to the fiction of an implied contract or warranty of authority.⁸⁶ The implied undertaking or warranty of the agent extends as well to cases in which he exceeds his authority as to cases in which he has no authority at all.

Contracts may be so framed as to leave it uncertain whether the agent meant to contract as agent or to make himself personally liable. In such a case the intention and understanding of the parties, as shown by the evidence of the contract, must govern. If an agent engages expressly in his own name to pay a sum of money or perform other obligations, he is personally responsible on such engagement, although he describes himself as agent, and was duly authorized to enter into such an engagement for his principal. If he uses his own name, and not the name of his principal, he is personally liable, and the

Y. 117; *Dung v. Parker*, 52 N. Y. 494; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *McCurdy v. Rogers*, 21 Wis. 199, 91 Am. Dec. 468; *Sheffield v. Ladue*, 16 Minn. 388 (Gil. 346), 10 Am. Rep. 145; *Cole v. O'Brien*, 34 Neb. 68, 51 N. W. 316, 33 Am. St. Rep. 616; *Senter v. Monroe*, 77 Cal. 347, 19 Pac. 580.

⁸⁴ *Roberts v. Button*, 14 Vt. 195; *Weare v. Gove*, 44 N. H. 196. And see *Terwilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404; *Solomon v. Penoyar*, 89 Mich. 11, 50 N. W. 644.

⁸⁵ See *Pothill v. Walker*, 3 Barn. & Ald. 114; *Randell v. Trimen*, 18 C. B. 786; *SMOUT v. ILBERY*, 10 Mees. & W. 1; *May v. Telegraph Co.*, 112 Mass. 50; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718; *Noyes v. Loring*, 55 Me. 408; *Dung v. Parker*, 52 N. Y. 494; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293.

⁸⁶ *Collen v. Wright*, 8 El. & Bl. 647; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Oliver v. Bank of England* (1902) 1 Ch. 210; *Batizen v. Nicolay*, 53 N. Y. 467; *Simmons v. More*, 100 N. Y. 140, 2 N. E. 640; *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246; *Lane v. Corr*, 156 Pa. 250, 25 Atl. 830; *Patterson v. Lippincott*, 47 N. J. Law, 457, 1 Atl. 506, 54 Am. Rep. 178; *Farmers' Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846; *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340.

fact that he uses the word "agent" after his name will not alter the case unless the wording of the contract shows that it was intended that the principal should be bound.⁸⁷

SAME—UNDISCLOSED PRINCIPAL—NAME UNDISCLOSED.

275. Where an agent enters into a contract, disclosing the existence, but not the name, of his principal,

- (a) **He is not personally liable if he contracted as agent only, and the other party so understood.**
- (b) **If credit was given to the agent, the other party may hold him personally, or may hold the undisclosed principal, at his election.**
- (c) **Unless the contrary clearly appears, it will be assumed that the other party intended to accept the alternative liability of agent or principal.**
- (d) **In the case of negotiable instruments, an unnamed principal cannot be sued.**

A man "has a right to the character, credit, and substance of the person with whom he contracts." If, therefore, he enters into a contract with an agent who does not give his principal's name, the presumption is that he is invited to give credit to the agent; still more if the agent does not disclose his principal's existence. In the last case invariably, in the former case within certain limits, the party who contracts with an agent on these terms gets an alternative right, and may elect to sue the agent or the principal upon the contract.⁸⁸

⁸⁷ *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Bickford v. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Barker v. Insurance Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; *Duvall v. Craig*, 2 Wheat. 45, 4 L. Ed. 180; *Woodbridge v. Hall*, 47 N. J. Law, 388, 1 Atl. 492; *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. St. Rep. 680; *Bean v. Mining Co.*, 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106; *Michael v. Jones*, 84 Mo. 578; *Simpson v. Garland*, 76 Me. 203; *Bradstreet v. Baker*, 14 R. I. 546. In some jurisdictions, however, it has been held that where such words as "agent," "trustee," and the like are affixed to the name of a party to the contract, they are prima facie descriptive only, but that it may be shown by extrinsic evidence that they were intended and understood by the parties as determining the character in which he contracted. *Pratt v. Beaupre*, 13 Minn. 187 (Gil. 177); *Deering v. Thom*, 29 Minn. 120, 12 N. W. 350; *Peterson v. Homan*, 44 Minn. 166, 46 N. W. 303, 20 Am. St. Rep. 564; *Rhone v. Powell*, 20 Colo. 41, 36 Pac. 899. Cf. *Rowell v. Oleson*, 32 Minn. 288, 20 N. W. 227. *American Bonding & Trust Co. v. Takahashi*, 49 C. C. A. 267, 111 Fed. 125; *Hayes v. Crane*, 48 Minn. 39, 50 N. W. 925. As to the rules applicable to negotiable instruments, see *Tiffany*, Ag. 336 et seq.

⁸⁸ *Kayton v. Barnett*, 116 N. Y. 625, 23 N. E. 24; *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Appeal of National Shoe & Leather Bank*, 55 Conn. 469, 12 Atl. 646.

Where an agent contracts as agent, and discloses the existence of his principal, but does not disclose his name, the rights and liabilities of agent and principal, as regards the other party to the contract, must depend on the construction of its terms. If it clearly appears that the intention was to contract as agent only, and that the other party so understood, the agent cannot be held liable.⁸⁹ If, on the other hand, it appears from the face of the contract, or from the conduct of the parties, that credit was given to the agent, and that the other party intended to hold him liable on the contract, he will be personally liable. And it will be assumed, in the absence of words strongly and distinctly expressive of agency, that one who deals with an agent for an unnamed principal intended to take the alternative liability of the principal or the agent.⁹⁰ An agent, therefore, to escape personal liability, should always either use his principal's name, or use terms that will clearly show that the contract was only intended to bind his principal.

To the rule that, where an agent contracts for an undisclosed principal, the other party is entitled to hold the principal liable, there is an exception in the case of negotiable instruments. If a person signs a negotiable note as "agent," without any words in the note to show who the principal was, he, only, is liable. The payee cannot prove who the principal was, and hold him liable.⁹¹

⁸⁹ *Fleit v. Murton*, L. R. 7 Q. B. 126; *Southwell v. Bowditch*, 1 C. P. Div. (C. A.) 374; *Berry v. Brown*, 107 N. Y. 659, 14 N. E. 289.

⁹⁰ *Thompson v. Davenport*, 9 B. & C. 78; *Bell v. Teague*, 85 Ala. 211, 3 South. 861; *Wheeler v. Reed*, 36 Ill. 81; *Kean v. Davis*, 20 N. J. Law, 425; *Murphy v. Helmrich*, 66 Cal. 69, 4 Pac. 958.

⁹¹ *Williams v. Robbins*, 16 Gray (Mass.) 77, 77 Am. Dec. 396; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101; *Davis v. England*, 141 Mass. 587, 6 N. E. 731; *Arnold v. Sprague*, 34 Vt. 402; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409 (cf. *Rendell v. Harriman*, 75 Me. 497, 46 Am. Rep. 421); *Collins v. Insurance Co.*, 17 Ohio St. 215, 93 Am. Dec. 612; *Ohio Nat. Bank v. Cook*, 38 Ohio St. 442; *Robinson v. Bank*, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829; *Williams v. Bank*, 83 Ind. 237; *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Scanlan v. Keith*, 102 Ill. 634, 40 Am. Rep. 624. In many jurisdictions, however, it is held that if a person signs a negotiable instrument as "agent," although the word agent is *prima facie* mere *descriptio personæ*, parol evidence is admissible between the original parties, and against a purchaser with notice, to show that it was the intention to bind the principal, and not the agent, and that if such intention is shown it will be given effect. *Metcalf v. Williams*, 104 U. S. 93, 26 L. Ed. 665; *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 11 Sup. Ct. 360, 34 L. Ed. 1019; *Kean v. Davis*, 21 N. J. Law, 683, 47 Am. Dec. 182; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Lafin & Rand Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472; *Lockwood v. Coley* (C. C.) 22 Fed. 192; *Martin v. Smith*, 65 Miss. 1, 3 South. 33; *Keidan v. Winegar*, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705; *Second Nat. Bank v. Steel Co.*, 155 Ind. 581, 58 N. E. 833; *Brunswick-Balke-Collender Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261; *McClellan v. Reynolds*, 49 Mo. 312; *Kline v. Bank*, 50 Kan. 91, 31 Pac. 688, 18 L. R. A. 533, 34 Am. St. Rep. 107; *Miller v. Way*, 5 S. D. 468, 59 N. W. 467. See *Tiffany*, Ag. 336 et seq.

It has been held that where one who is in fact the real principal has, under the circumstances above stated, contracted as ostensible agent of an unnamed principal, he may, as against the party with whom he contracted, repudiate the character of agent, and adopt that of principal, though the effect of this is to deprive the other party of the alternative liability of the agent or the unnamed principal,⁹² since, the supposed principal being unnamed, the other party cannot have contracted in reliance upon him personally.

SAME—UNDISCLOSED PRINCIPAL—EXISTENCE UNDISCLOSED.

276. Where an agent enters into a contract on behalf of his principal, without disclosing the principal's existence,

- (a) The other party may, at his election, hold either the principal or the agent, except—**
 - (1) Where the contract is under seal or a negotiable instrument.**
 - (2) Where the terms of the contract are incompatible with the existence of agency.**
 - (3) Where the other party has once made his election to hold one or the other.**
 - (4) Where the principal, while exclusive credit was given to the agent, has settled with the agent for what he has received.**
- (b) The principal may sue on such a contract, subject to the other party's right to set up any defense he might have used against the agent.**

If the agent acts on behalf of a principal whose existence he does not disclose, the other contracting party, subject to exception in the case of deeds or other instruments under seal,⁹³ and in the case of negotiable instruments,⁹⁴ is entitled to elect whether he will treat principal or agent as the party with whom he dealt.⁹⁵ The reason of this rule is that, if a person enters into a contract with another, he is en-

⁹² *Schmalz v. Avery*, 16 Q. B. 655.

⁹³ *Schach v. Anthony*, 1 Maule & S. 573; *Berkeley v. Hardy*, 8 Dowl. & R. 102; *Machesney v. Brown* (C. C.) 29 Fed. 145; *Guyon v. Lewis*, 7 Wend. (N. Y.) 26; *Kiersted v. Railroad Co.*, 69 N. Y. 343, 25 Am. Rep. 199; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126; *Fullam v. Inhabitants of West Brookfield*, 9 Allen (Mass.) 1. An undisclosed principal cannot maintain an action on an instrument under seal. *Schach v. Anthony*, supra; *Berkeley v. Hardy*, supra; *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Schaefer v. Henkel*, 75 N. Y. 378; *Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550.

⁹⁴ Ante, p. 520, note, 21.

⁹⁵ *Merrill v. Kenyon*, 48 Conn. 314, 40 Am. Rep. 174; *Irvine v. Watson*, 5 Q. B. Div. 414; *Bacon v. Rupert*, 39 Minn. 512, 40 N. W. 832; *Porter v. Day*, 44 Ill. App. 256; *Hubbard v. Ten Brook*, 124 Pa. 291, 16 Atl. 817, 2 L. R. A. 823, 10 Am. St. Rep. 585; *WELCH v. GOODWIN*, 123 Mass. 71, 25 Am. Rep. 24; *Baldwin v. Leonard*, 39 Vt. 260, 94 Am. Dec. 324; *Holt v. Ross*, 54 N. Y. 472, 13 Am. Rep. 615; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Bacon v. Sondley*, 3 Strob. (S. C.) 542, 51 Am. Dec. 646.

titled, at all events, to the liability of the party with whom he supposed himself to be contracting. If he subsequently discovers that such person is in fact the representative of another, he is entitled to choose whether he will accept the actual state of things, and sue the latter as principal, or whether he will adhere to the supposed state of things upon which he entered into the contract, and continue to treat the agent as the principal party. In such a case the other party to the contract may prove the agency for the purpose of fixing the liabilities of the contract on the principal, but the agent cannot prove the agency for the purpose of escaping liability. The real principal is entitled to sue on such a contract, but the other party may set up any defense which he might have used against the agent.⁹⁶

The right of the other contracting party to avail himself of his alternative right to sue either the agent or the undisclosed principal may in various ways be so determined that he is limited to one of the two, and no longer has the choice of either liability.

(1) In the first place, the agent may contract in such terms that the agency is incompatible with the construction of the contract. Thus, where an agent, in making a charter party, described himself therein as owner of the ship, it was held that he could not be regarded as agent.⁹⁷

(2) If the other party to the contract, after having discovered the existence of the undisclosed principal, does anything unequivocally indicating that he adopts either principal or agent as the party liable to him, his election is determined, and he cannot afterwards sue the other.⁹⁸ So, too, if, before he ascertains the fact of agency, he sues the agent and obtains judgment, he cannot afterwards recover against the principal.⁹⁹ But the mere bringing of an action, or other recognition of the liability of one of the parties, while in ignorance of the agency, would not thus determine his rights, "for it may be that an

⁹⁶ *Taintor v. Prendergast*, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; *Ruiz v. Norton*, 4 Cal. 355, 60 Am. Dec. 618; *Parker v. Cochrane*, 11 Colo. 363, 18 Pac. 209; *Foster v. Smith*, 2 Cold. (Tenn.) 474, 88 Am. Dec. 604; *Gilpin v. Howell*, 5 Pa. 41, 45 Am. Dec. 720; *Rosser v. Darden*, 82 Ga. 219, 7 S. E. 919, 14 Am. St. Rep. 152; *Ames v. Railroad Co.*, 12 Minn. 412 (Gil. 295); *Elkins v. Railroad Co.*, 19 N. H. 337, 51 Am. Dec. 184; *Tutt v. Brown*, 5 Litt. (Ky.) 1, 15 Am. Dec. 33; *Hunter v. Giddings*, 97 Mass. 41, 93 Am. Dec. 54; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Wood v. Bank*, 129 Mass. 358, 37 Am. Rep. 366; *Bernshouse v. Abbott*, 45 N. J. Law, 531, 46 Am. Rep. 789.

⁹⁷ *Humble v. Hunter*, 12 Q. B. 310.

⁹⁸ *Paterson v. Gandasequi*, 15 East, 62; *Kingsley v. Davis*, 104 Mass. 178; *Coleman v. Bank*, 53 N. Y. 388; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Schepfflin v. Dessar*, 20 Mo. App. 569. Contra, *Beymer v. Bonsall*, 79 Pa. 298.

⁹⁹ *Priestlie v. Fernie*, 3 Hurl. & C. 977; *Kingsley v. Davis*, 104 Mass. 178. Contra (where judgment is not discharged), *Blymer v. Bonsall*, 79 Pa. 298; *Brown v. Reiman*, 48 App. Div. 295, 62 N. Y. Supp. 663. Cf. *Maple v. Railroad Co.*, 40 Ohio St. 313, 48 Am. Rep. 685.

action against one might be discontinued and fresh proceedings be well taken against the other.”¹⁰⁰

(3) Again, if, while exclusive credit is given to the agent, the undisclosed principal pays the agent for the price of goods sold to him, he cannot be sued when he is discovered to be the purchaser. If a person buys goods from another on behalf of a principal whose existence he does not disclose, and the principal, before he is known to be principal, pays the price to the agent, the principal cannot be sued by the seller.¹⁰¹ But the case is different where the existence of a principal is known, though his name is not disclosed. There the other contracting party presumably looks beyond the agent to the credit of the principal. “The essence of such a transaction is that the seller, as an ultimate resource, looks to the credit of some one to pay him if the agent does not. Till the agent fails in payment, the seller does not want to have recourse to this additional credit; it remains in the background. But if, before the time comes for payment, or before, on non-payment by the agent, recourse can fairly be had to the principal, whose credit still remains pledged, the principal can pay or settle his account with his own agent, he will be depriving the seller, behind the seller’s back, of his credit.”¹⁰²

SAME—FRAUD OF AGENT.

277. If an agent is guilty of fraud in entering into a contract on behalf of his principal,

- (a) **Both he and his principal are liable, if he acted within the scope of his employment.**
- (b) **He, but not his principal, is liable if he acted without the scope of his employment.**
- (c) **In either case, subject to the conditions mentioned in treating of fraud, the other party may avoid the contract.**

The principal is liable to an action for deceit for the fraud of his agent, if the fraud was committed in the ordinary course of his employment.¹⁰³ The liability of the principal is in no wise different from

¹⁰⁰ *Priestly v. Fernie*, 3 Hurl. & C. 984; *Gardner v. Peaslee*, 143 Mass. 382, 9 N. E. 833; *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51; *Ferry v. Moore*, 18 Ill. App. 135; *Kingsley v. Davis*, 104 Mass. 178.

¹⁰¹ *Armstrong v. Stokes*, L. R. 7 Q. B. 599; *Fradley v. Hyland* (C. C.) 37 Fed. 49, 2 L. R. A. 749; *Clealand v. Walker*, 11 Ala. 1058, 46 Am. Dec. 238; *Thomas v. Atkinson*, 38 Ind. 248. It is open to question whether settlement with the agent on the part of the principal is a defense unless the principal was induced by words or conduct of the other party, sufficient to create an estoppel, to believe that settlement had been made by the agent. See *Irvine v. Watson*, 5 Q. B. Div. 102, 414; *Tiffany*, Ag. 235, 240.

¹⁰² *Irvine v. Watson*, 5 Q. B. Div. 107 (Ct. App.) 414.

¹⁰³ *Barwick v. Bank*, L. R. 2 Exch. 259; *Jeffrey v. Bigelow*, 13 Wend. (N.

that of an employer who is responsible for wrongful acts done by those in his service, within the scope of their employment. A man is equally liable for the negligence of his coachman, who runs over a foot passenger in driving his master's carriage from the house to the stables, and for the fraud of his agent, who, being instructed to obtain a purchaser for certain goods, obtains one by false statements as to the quality of the goods. But, if the person employed act beyond the scope of his employment, he no longer represents his employer to bind him by tort or contract.¹⁰⁴ Where an agent, for instance, was employed to sell a log of mahogany, but was not authorized to warrant its soundness, and he did so knowing it to be unsound, it was held that the employer was not liable for deceit, and, further, that the contract could not be avoided because the parties could no longer be replaced in their previous positions, for the log had been sawed up and partly used.¹⁰⁵ The rights of the parties may be stated to be as follows: If the agent commits a fraud in the course of his employment, he is liable,¹⁰⁶ and so is his principal.¹⁰⁷ If he commits a fraud outside the scope of his authority, he would be liable, but not his principal.¹⁰⁸ In either case the other party would be entitled to avoid the contract upon the conditions described in treating of the effect of fraud.¹⁰⁹

DETERMINATION OF THE RELATION.

278. The authority of an agent may be determined—

(a) By agreement; and this may be:

(1) By performance of the object of the agency.

(2) By efflux of a specified time.

(3) By revocation or renunciation in accordance with the express or implied terms of the contract.

(b) By the act of one of the parties, revoking or renouncing the agency in breach of the contract of employment. The authority is revoked, though the contract is broken.

EXCEPTIONS—(1) Authority cannot be revoked where it is coupled with an interest.

(2) Notice of the revocation must be given those to whom the agent has been held out.

Y. 518, 28 Am. Dec. 476; *Smith v. Tracy*, 36 N. Y. 79; *Locke v. Stearns*, 1 Mete. (Mass.) 560, 35 Am. Dec. 382; *Wolfe v. Pugh*, 101 Ind. 293; *Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459; *Rhoda v. Annis*, 75 Me. 17, 46 Am. Rep. 354; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800, 6 L. R. A. 121, 17 Am. St. Rep. 178.

¹⁰⁴ *Udell v. Atherton*, 7 Hurl. & N. 172; *Nichols v. Bruns*, 5 Dak. 28, 37 N. W. 752.

¹⁰⁵ *Udell v. Atherton*, 7 Hurl. & N. 172.

¹⁰⁶ *Campbell v. Hillman*, 15 B. Mon. (Ky.) 508, 61 Am. Dec. 195; *Clark v. Lovering*, 37 Minn. 120, 33 N. W. 776; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Kroeger v. Pitcairn*, 101 Pa. 311, 47 Am. Rep. 718.

¹⁰⁷ Note 103, *supra*.

¹⁰⁸ Notes 104, 105, *supra*.

¹⁰⁹ *Ante*, p. 234.

(c) **By operation of law.** This results from—

- (1) **The destruction of the subject-matter of the agency.**
- (2) **The bankruptcy of either party.**
- (3) **The marriage of a feme sole principal.**
- (4) **The insanity of either party.**
- (5) **The death of either party.**

EXCEPTION—An authority coupled with an interest is not revoked by operation of law in such cases.

By Agreement.

Since the relation of principal and agent is that of employer and employed (a relation founded on mutual consent), it follows that the relation may be brought to a close by the same process which created it,—the agreement of the parties. This may be by an agreement expressly entered into, after the creation of the agency, for the purpose of terminating it, or it may be by the fulfillment of terms expressed or implied in the contract of employment. Where, at the time the agency is created, its duration is fixed, then, in accordance with the agreement, it ceases on the efflux of the time specified.¹¹⁰ It also necessarily ceases, where no time is specified, when the object to which the agency was expressly limited is performed.¹¹¹ Again, the contract of employment may contain terms allowing the agency to be terminated by one or either party on certain conditions. A revocation or renunciation in accordance with the terms of the contract is a determination of the agency by agreement.¹¹² Such terms may be expressed or implied. Where the contract is silent as to the right to revoke or renounce the authority, and there is nothing in the nature of the contract or the circumstances to show a contrary intention, the authority may be rightly revoked or renounced at any time on notice.¹¹³

By the Act of the Parties.

We have just seen that an agency may be revoked or renounced in accordance with express or implied terms in the contract of employment. Such a determination of the agency, though in a sense by the acts of the parties, is by agreement. The contract of employment is not broken. On the other hand, one of the parties may revoke or renounce the agency, not in accordance with the terms of the contract, but in violation of them. The agency in this case is determined by the act of the party, but it is determined contrary to agreement. The

¹¹⁰ *Gundlach v. Fischer*, 59 Ill. 172; *Danby v. Coutts*, 29 Ch. Div. 500.

¹¹¹ *Benoit v. Inhabitants of Conway*, 10 Allen (Mass.) 528; *Moore v. Stone*, 40 Iowa, 259; *Short v. Millard*, 68 Ill. 292.

¹¹² *Oregon & W. Mortg. Sav. Bank v. Mortgage Co. (C. C.)* 35 Fed. 22; *Adrianse v. Rutherford*, 57 Mich. 170, 23 N. W. 718.

¹¹³ *Barrows v. Cushman*, 37 Mich. 481; *Kirk v. Hartman*, 63 Pa. 97; *Chambers v. Seay*, 73 Ala. 372; *North Carolina State Life Ins. Co. v. Williams*, 91 N. C. 69, 49 Am. Rep. 637.

contract of employment is broken, and the other party may recover his damages for the breach, as in the case of any other breach of contract.¹¹⁴ The authority, however, subject to certain exceptions, is effectually determined.¹¹⁵ A principal, therefore, may revoke the authority of his agent, though in doing so he violates the contract of employment; and the acts of the agent after such revocation will not bind the principal.¹¹⁶ This power of revocation, however, is subject to the limitation already explained,—that a principal cannot, by private communications with his agent, limit or revoke an authority which he has allowed his agent to assume before the public. He will be bound by the acts of the agent which he has given other persons reason to suppose are done by his authority.¹¹⁷ As we have already seen, a husband may, by his conduct in allowing his wife to deal on his credit, constitute her his agent to pledge his credit.¹¹⁸ If he has allowed her to so deal with a tradesman, and has acquiesced by paying her bills, this tradesman may assume that her authority continues until he receives notice to the contrary. In the absence of such a notice, the tradesman's right to hold the husband cannot be affected by the husband's private revocation of her authority. In the absence of such authority arising from the conduct of the husband, he is entitled, as against persons dealing with the wife, to revoke any express or implied authority which he may have given her, and to do so without notice to persons so dealing. Where a wife, after being forbidden by her husband to pledge his credit, purchased goods on his credit from a tradesman who had never before so dealt with her, it was held that he could not hold the husband, though he had no notice of the latter's refusal to authorize her dealings. "The tradesman must be taken to know the law; he knows that the wife has no authority, in fact or in

¹¹⁴ *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Weed v. Burt*, 78 N. Y. 192; *Lewis v. Insurance Co.*, 61 Mo. 534; *James v. Allen Co.*, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821; *Richardson v. Machine Works*, 78 Ind. 422, 41 Am. Rep. 584. As to the measure of damages, see *Mech. Ag.* § 622.

¹¹⁵ *Mech. Ag.* § 204 (and cases there cited); *Chambers v. Seay*, 73 Ala. 372; *Blackstone v. Buttermore*, 53 Pa. 266; *Allen v. Watson*, 16 Johns. (N. Y.) 295; *Walker v. Denison*, 86 Ill. 142; *Attrill v. Patterson*, 58 Md. 226; *Jones v. Harris*, 59 Miss. 214.

¹¹⁶ *Tucker v. Lawrence*, 56 Vt. 467; *Simpson v. Carson*, 11 Or. 361, 8 Pac. 325; *Darrow v. St. George*, 8 Colo. 592, 9 Pac. 791; *Providence Gas Burner Co. v. Barney*, 14 R. I. 18; *Johnson v. Youngs*, 82 Wis. 107, 51 N. W. 1095.

¹¹⁷ *Debenham v. Mellon*, 5 Q. B. Div. 394, 6 App. Cas. 24; *Clafin v. Lenheim*, 66 N. Y. 301; *Baudouine v. Grimes*, 64 Iowa, 370, 20 N. W. 476; *Diversy v. Kellogg*, 44 Ill. 114, 92 Am. Dec. 154; *Wright v. Herrick*, 128 Mass. 240; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84, 24 L. Ed. 653; *Tier v. Lampton*, 35 Vt. 179, 82 Am. Dec. 634; *Capen v. Insurance Co.*, 25 N. J. Law, 67, 44 Am. Dec. 412; *Howe Mach. Co. v. Simler*, 59 Ind. 307; *Van Dusen v. Star Quartz Min. Co.*, 36 Cal. 571, 95 Am. Dec. 209.

¹¹⁸ *Ante*, p. 561.

law, to pledge the husband's credit, even for necessities, unless he expressly or impliedly gives it to her, and that what the husband gives he may take away." ¹¹⁹

A further limitation, in favor of the agent, of the principal's power of revocation, is that "an authority coupled with an interest is irrevocable." ¹²⁰ By "interest," as the term is here used, is meant something more than the advantage which the agent may derive from a continuance of the authority, or the inconvenience, or even the loss, which he may suffer by its revocation. These are not such interests as will prevent a revocation by the principal. "Where an agreement," it has been said, "is entered into on a sufficient consideration, whereby an authority is given for the purpose of conferring some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest." ¹²¹ This, however, is too broad. "To impart an irrevocable quality to a power of attorney, in the absence of any express stipulation, and as a result of legal principles alone, there must coexist with the power an interest in the thing or estate to be disposed of or managed under the power." ¹²²

Operation of Law.

An agency may also be revoked by operation of law in certain cases. If the subject-matter of the agency is extinguished or ceases to exist, this will revoke the agency. It has been held, for instance, that where two persons jointly appoint an agent to take charge of some matter in which they are jointly interested, as to sell real estate owned by them jointly, a severance of the joint interest revokes the agency. ¹²³ And, where a landowner employed several different agents to act for him in the sale of the same tract of land, a sale by one of them was held a revocation of the authority of the others. ¹²⁴

The bankruptcy of the principal determines an authority given while he was solvent. ¹²⁵

¹¹⁹ Debenham v. Mellon, 5 Q. B. Div. 394.

¹²⁰ Hutchins v. Hebbard, 34 N. Y. 24; Guthrie v. Railway Co., 40 Ill. 109; Chambers v. Seay, 73 Ala. 372; Wheeler v. Knaggs, 8 Ohio, 169; Kindig v. March, 15 Ind. 248.

¹²¹ Smart v. Sanders, 5 C. B. 895, 917.

¹²² Hartley's Appeal, 53 Pa. 212, 91 Am. Dec. 207. And see Hunt v. Rousmanier, 8 Wheat. 174, 7 L. Ed. 27; Blackstone v. Buttermore, 53 Pa. 266; Chambers v. Seay, 73 Ala. 373; Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030; Gilbert v. Holmes, 64 Ill. 548; Oregon & W. Mortg. Sav. Bank v. Mortgage Co. (C. C.) 35 Fed. 22; Barr v. Schroeder, 32 Cal. 609; Darrow v. St. George, 8 Colo. 592, 9 Pac. 791; Tiffany, Ag. 152 et seq.

¹²³ Rowe v. Rand, 111 Ind. 206, 12 N. E. 377.

¹²⁴ Ahern v. Baker, 34 Minn. 98, 24 N. W. 341.

¹²⁵ Parker v. Smith, 16 East, 386; Minett v. Forrester, 4 Taunt. 541.

At common law, the marriage of a female principal determines an authority given while sole.¹²⁶

The insanity of the principal annuls or suspends an authority given while sane,¹²⁷ but subject to this limitation, namely, that where a person, while sane, holds out another as having authority, and afterwards becomes insane, his insanity does not revoke the agent's authority as to persons to whom he has been so held out, and who have no notice of the principal's condition.¹²⁸

The death of the principal determines at once the authority of the agent, leaving the third party without a remedy upon contracts entered into by the agent when ignorant of the death of his principal.¹²⁹ The agent in such case is not personally liable as having contracted on behalf of a principal who did not exist; nor is the estate of the deceased liable, for the authority was given for the purpose of representing the principal, and not his estate.¹³⁰ Necessarily, the death of the agent determines the agency.¹³¹ And, where two persons are jointly appointed agents to take charge of a particular business for a specified

¹²⁶ Anon., 1 Salk. 399; *Brown v. Miller*, 46 Mo. App. 1; *Charnley v. Winstanley*, 5 East, 266.

¹²⁷ *Davis v. Lane*, 10 N. H. 156; *Matthiessen & Welchers Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536. "An agent always acts in the name of the principal. Agency presupposes the presence of the principal in the person of, and acting through, the agent. The power that binds is not that of the agent, but the power of the principal acting through the agent. When a person loses the power to bind himself by his own acts, it is true, as a general principle, that that loss works a like loss in all those upon whom he has conferred the power to bind him." *Motley v. Head*, 43 Vt. 633.

¹²⁸ *DREW v. NUNN*, 4 Q. B. Div. 689; *Davis v. Lane*, 10 N. H. 156.

¹²⁹ *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589; *Davis v. Bank*, 46 Vt. 728; *Webber v. Bridgman*, 113 N. Y. 600, 21 N. E. 985; *Galt v. Galloway*, 4 Pet. 331, 7 L. Ed. 876; *Gale v. Tappan*, 12 N. H. 145, 37 Am. Dec. 194; *Home Nat. Bank v. Waterman's Estate*, 134 Ill. 461, 29 N. E. 503; *Travers v. Crane*, 15 Cal. 12; *Clayton v. Merrett*, 52 Miss. 353; *Lewis v. Kerr*, 17 Iowa, 73; *Saltmarsh v. Smith*, 32 Ala. 404; *Rigs v. Cage*, 2 Humph. (Tenn.) 350, 37 Am. Dec. 559; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; *Staples v. Bradbury*, 8 Greenl. (Me.) 181, 23 Am. Dec. 494; *Smith v. Smith*, 46 N. C. 135; *Jenkins v. Atkins*, 1 Humph. (Tenn.) 293, 34 Am. Dec. 648. But see *Dick v. Page*, 17 Mo. 234, 57 Am. Dec. 267. Payment to an agent, in ignorance of his principal's death, has been held valid. *Cassiday v. McKenzie*, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76. It has been held that where an agent sends an order by mail, on the day before the death of his principal, to a nonresident merchant, and the latter fills the order within a reasonable time in ignorance of the death of the principal, the contract is binding as of the day the order was deposited in the mail. *Garrett v. Trabue*, 82 Ala. 227, 3 South. 149.

¹³⁰ *Blades v. Free*, 9 Barn. & C. 167.

¹³¹ *In re Merrick's Estate*, 8 Watts & S. (Pa.) 402; *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Lehigh Coal & Nav. Co. v. Mohr*, 83 Pa. 228, 24 Am. Rep. 161.

term or purpose, the agency is revoked by the death or insanity of one of them.¹⁸²

Determination of an agency by operation of law does not take place where the authority is coupled with an interest.¹⁸⁸

¹⁸² *Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377; *Martine v. Insurance Co.*, 53 N. Y. 339, 13 Am. Rep. 529.

¹⁸⁸ *Davis v. Lane*, 10 N. H. 160; *Hunt v. Rousmanler*, 8 Wheat. 174, 5 L. Ed. 589; *Knapp v. Alvord*, 10 Paige (N. Y.) 205; *Merry v. Lynch*, 68 Me. 94; *Travers v. Crane*, 15 Cal. 12. And see cases above cited; *Watson v. King*, 4 Camp. 274.

CLARK CONT. (2D ED.)—34

CHAPTER XIII.

QUASI CONTRACT.

- 279. In General.
- 280. Money Paid for the Use of Another.
- 281. Money Received for the Use of Another.
- 282. Recovery for Benefits Conferred.

IN GENERAL.

279. Ordinarily, a person can only maintain an action *ex contractu* against another by proving a contract in fact. There are circumstances, however, under which the law will create a fictitious promise for the purpose of allowing the remedy by action of *assumpsit*. The obligation is not a contract, but a quasi contract. It may be founded—
- (a) Upon the judgment of a court.
 - (b) Upon a statutory, official, or customary duty.
 - (c) Upon the principle that no one ought unjustly to enrich himself at the expense of another.

As we have seen in treating of the nature of contract, every true contract involves, not only obligation, but agreement. If there is no agreement, there can be no true contract. There may be an obligation, but, unless this obligation is imposed by the free consent of the parties, the obligation is not a contractual obligation.

There are, however, as has been stated, certain obligations which arise neither from tort nor from contract, but which are imposed or created by law without the assent of the party bound, and which are allowed to be enforced by an action *ex contractu*. These obligations are not contract obligations, for there is no agreement, but they are clothed with the semblance of contract for the purpose of remedy. They are described by the term quasi contracts.¹

For example, obligation may arise from the judgment of a court of competent jurisdiction ordering something to be done or forbore by one party in respect to another. It may arise from entry of judgment by consent of the parties, in which case the element of agreement is present; but, on the other hand, it may arise against the will of the party bound thereby, in which case there is no element of agreement, and therefore no true contract. Such an obligation is quasi con-

¹ Anson, *Cont.* (8th Ed.) 361 et seq.; Keener, *Quasi Cont.* c. 1; Dusenbury v. Speir, 77 N. Y. 150. See, also, *Lawson's Ex'rs v. Lawson*, 16 Grat. (Va.) 230; *SCEVA v. TRUE*, 53 N. H. 627; *HERTZOG v. HERTZOG*, 29 Pa. 465; *Montgomery v. Waterworks Co.*, 77 Ala. 248.

tractual.² As we have seen, however, in the classification of contracts, it is usual to divide contracts into simple contracts, contracts under seal, and "contracts of record," under which are included judgments.³

Again, if A. has paid something which B. ought to pay, or if B. has received something which A. ought to receive, the law imposes on B. the duty to make good to A. the advantage to which A. is entitled. Or if A. has obtained money from B. through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law imposes a duty on the wrongdoer to restore it to the rightful owner, although this was the very opposite of his intention.⁴

It is obvious that the duty of B. in such cases is not contractual. Nevertheless, in the classification of contracts, it has been usual to divide simple contracts into (1) express contracts; (2) contracts implied in fact; and (3) contracts implied in law. Under this classification the term "contracts implied in fact" is applied to contracts in which the agreement of the parties is evidenced by their conduct, and which are true contracts, in distinction to contracts in which the agreement is evidenced by words and which are said to be express; and the term "contract implied in law" is applied to obligations created by law, or quasi contracts. "This treatment of quasi contract," says Professor Keener, "is, in the opinion of the writer, not only unscientific, and therefore theoretically wrong, but is also destructive of clear thinking, and therefore vicious in practice. It needs no argument to establish the proposition that it is not scientific to treat as one and the same thing an obligation that exists in every case because of the assent of the defendant, and an obligation that not only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent."⁵

The explanation of this anomalous classification, which includes obligations created by law among contracts, is to be found in the law of remedies.⁶ The only forms of action at common law were actions of tort and actions of contract. Obligations created by law resemble true contracts, in that "the duty of the obligor is a positive one; that is, to act. In this respect they differ from obligations the breach of which constitutes a tort, where the duty is negative; that is, to for-

² Keener, *Quasi Cont.* 16; *State of Louisiana v. Mayor, etc., of City of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; *O'BRIEN v. YOUNG*, 95 N. Y. 428, 47 Am. Rep. 64; *Rae v. Hulbert*, 17 Ill. 572; *Morse v. Tappan*, 3 Gray (Mass.) 411; *Gutta-Percha & R. Mfg. Co. v. City of Houston*, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. Rep. 412; *Morley v. Lake Shore & M. S. Ry.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; ante, p. 47.

³ Ante, p. 8.

⁴ See *Dusenbury v. Speir*, 77 N. Y. 150.

⁵ Keener, *Quasi Cont.* 3.

⁶ See Keener, *Quasi Cont.* c. 1; Anson, *Cont.* (8th Ed.) 360-364; *The History of Assumpsit*, by Prof. J. B. Ames, 2 Harv. L. R. 1-19, 53-69.

bear.⁷ This and other considerations suggested the analogy of contract, rather than of tort, and made it natural, when seeking to adapt the remedy to the right, to treat obligations created by law as contracts rather than torts. An action of debt was the remedy for breach of contract based on executed consideration, where such breach resulted in a liquidated or ascertained money claim, and also where a statute or the common law or custom laid a duty upon one to pay an ascertained sum to another. Assumpsit was primarily an action to recover an unliquidated sum, or such damages as the breach of a promise had occasioned to the promisee.⁸ Owing to certain inconveniences attaching to the action of debt, assumpsit was preferred to debt as a form of action, and by degrees the scope of the action was enlarged, until the action of assumpsit came to be used instead of debt, where the contract resulted in a liquidated claim, and a money debt was stated in the form of an assumpsit or undertaking to pay it. Thus it came about that an action might be maintained in assumpsit on a liquidated claim or debt; and when the breach of a contract resulted in such a claim, the plaintiff was allowed to declare in the form of a short statement of the debt, based upon a request by the defendant, as for goods sold, money lent, work and labor supplied, etc.⁹ This enabled claims arising from contract to be variously stated in the same suit "as a special agreement which had been broken, and as a debt resulting from an agreement, and hence imparting a promise to pay. Such a mode of pleading was called an indebitatus count, or count indebitatus assumpsit."¹⁰ The promise in such cases, resulting from the terms of the agreement, although only by an innovation in the form of remedy made the basis of an assumpsit, was actual, and not a mere fiction.¹¹ The form of action thus evolved, however, came to be applied to those kinds of legal liability which had previously given rise to an action of debt, though void of the element of agreement. In these cases the form of remedy could be adapted to the right only by means of a fiction, for to support assumpsit it was necessary to allege a promise, and consequently, to meet the difficulty, the courts adopted the fiction of a promise, and it was declared that a promise was "implied in law."¹² It was in this way that these obligations became clothed with the semblance of, and came to be classed as, contracts. "For the convenience of the remedy," they "have been made to figure as though they sprung from contract, and have appropriated the form of agreement."¹³

⁷ 2 Harv. L. R. 63.

⁸ Anson, *Cont.* (8th Ed.) 361.

⁹ *Id.* 362; SLADE'S CASE, 4 Co. Rep. 92.

¹⁰ Anson, *Cont.* (8th Ed.) 362.

¹¹ See 2 Harv. L. R. 56.

¹² Keener, *Quasi Cont.* 4-5.

¹³ Anson, *Cont.* (8th Ed.) 362.

Quasi contracts fall under three classes:¹⁴ (1) Obligations founded upon a record, as a judgment;¹⁵ (2) obligations founded upon a statutory,¹⁶ or official, or customary duty;¹⁷ and (3) obligations founded "upon the fundamental principle that no one ought unjustly to enrich himself at the expense of another,"¹⁸ as the obligation to repay money paid under a mistake or under duress or compulsion, the obligation of an infant to pay for necessities, the obligation to pay for benefits conferred under a contract unenforceable because within the statute of frauds which the party who has received the benefit refuses to carry out, the obligation to pay for benefits conferred under a contract where full performance is prevented.

Within the third class are embraced the most important cases of quasi contractual obligation, and the brief discussion which follows will be confined to cases within that class.

MONEY PAID FOR THE USE OF ANOTHER.

280. Wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter,—a request to make the payment, and a promise to repay,—and the obligation thus created may be enforced by *assumpsit*.

It is a rule of law that no man "can make himself the creditor of another by paying that other's debt against his will or without his consent,"¹⁹ or at least without some act on his part which will prevent him from withholding consent. *Assumpsit* will not lie, therefore, for money officiously paid by the plaintiff for the defendant's use. The defendant must have requested such payment, or he must, by his con-

¹⁴ 2 Harv. L. R. 64; Keener, *Quasi Cont.* c. 1.

¹⁵ Ante, p. 49.

¹⁶ Keener, *Quasi Cont.* 16; *State of Louisiana v. Mayor, etc., of City of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; *O'BRIEN v. YOUNG*, 95 N. Y. 428, 47 Am. Rep. 64; *Rae v. Hulbert*, 17 Ill. 572; *Morse v. Tappan*, 3 Gray (Mass.) 411; *Gutta-Pereha & R. Manuf'g Co. v. City of Houston*, 108 N. Y. 276, 15 N. E. 402, 2 Am. St. Rep. 412. Illustrations of such an obligation arise where a statute imposes a duty upon one county or parish to pay another for money expended in the support of a pauper; or under any other circumstances declares that one person may recover from another money paid out by him for the benefit of the latter; or where a statute allows an action to recover usury paid, or money lost and paid on a wager.

¹⁷ See Keener, *Quasi Cont.* 17, 18.

¹⁸ 2 Harv. L. R. 64.

¹⁹ *Johnson v. Packet Co.*, L. R. 3 C. P. 43; *Durnford v. Messiter*, 5 Maule & S. 446; *Hearn v. Cullen*, 54 Md. 533; *Turner v. Egerton*, 1 Gill & J. (Md.) 430; ante, p. 510.

duct, have made it necessary for the plaintiff to pay. Where a person expressly requests another to pay money for him under such circumstances as to import a promise to repay, and the money is paid in accordance with the request, the transaction involves an actual agreement. Where no request in fact exists, and there is no agreement in fact respecting the payment, the law may imply a fictitious request. As a rule, wherever one person requests or allows another to assume such a position that the latter may be compelled by law to discharge the former's legal liabilities, the law imports a request and promise by the former to the latter,—a request to make the payment, and a promise to repay. It will not do to say that there was no agreement in fact, for the law creates the promise.²⁰

A good illustration of such an obligation is where one of several sureties, or other joint debtors, pays the whole debt. In such a case he is allowed to recover from each of the others his proportionate share. A request to pay and a promise to repay are feigned in order to entitle him to the remedy of *assumpsit*.²¹ So, where an executor

²⁰ *Anson*, Cont. (8th Ed.) 363; *EXALL v. PARTRIDGE*, 8 Term R. 308; *Sapsford v. Fletcher*, 4 Term R. 511; *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. 677; *Grissell v. Robinson*, 3 Bing. N. C. 10; *Wells v. Porter*, 7 Wend. (N. Y.) 119; *Houser v. McGinnas*, 108 N. C. 631, 13 S. E. 139; *Hawley v. Beverley*, 6 Man. & G. 221; *JOHNSON v. PACKET CO.*, L. R. 3 C. P. 38; *HALES v. FREEMAN*, 1 Brod. & B. 391; *Hutzler v. Lord*, 64 Md. 534, 3 Atl. 891; *Turner v. Egerton*, 1 Gill & J. (Md.) 430; *City of Baltimore v. Hughes*, Id. 480, 19 Am. Dec. 243; *Iron City Tool-Works v. Long* (Pa.) 7 Atl. 82; *Beard v. Horton*, 86 Ala. 202, 5 South. 207; *Perin v. Parker*, 25 Ill. App. 465.

²¹ *KEMP v. FENDER*, 12 Mees. & W. 421; *Holmes v. Williamson*, 6 Maule & S. 158; *DAVIES v. HUMPHREYS*, 6 Mees. & W. 153; *DEERING v. WINCHELSEA*, 2 Bos. & P. 270; *Norton v. Coons*, 6 N. Y. 33; *Doremus v. Selden*, 19 Johns. (N. Y.) 213; *Tobias v. Rogers*, 13 N. Y. 59; *Johnson v. Harvey*, 84 N. Y. 363, 38 Am. Rep. 515; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791; *Jackson v. Murray*, 77 Tex. 644, 14 S. W. 235; *Nickerson v. Wheeler*, 118 Mass. 295; *Wilton v. Tazwell*, 86 Ill. 29; *Yates v. Donaldson*, 5 Md. 389, 61 Am. Dec. 283; *Sears v. Starbird*, 78 Cal. 225, 20 Pac. 547; *Fletcher v. Grover*, 11 N. H. 368, 35 Am. Dec. 497; *Foster v. Burton*, 62 Vt. 239, 20 Atl. 326; *Logan v. Trayser*, 77 Wis. 579, 46 N. W. 877; *Bushnell v. Bushnell*, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411. In some jurisdictions, contribution between co-sureties must be enforced in equity. *Longley v. Griggs*, 10 Pick. (Mass.) 121; *McDonald v. Magruder*, 3 Pet. 470, 7 L. Ed. 744. And, where a surety has been compelled to pay the debt, he may, on the same principle, where there is no express contract with the principal (*TOUISSAINT v. MARTINANT*, 2 Term R. 100), recover the amount from his principal, as for money paid to his use. *Alexander v. Vane*, 1 Mees. & W. 511; *Pownall v. Ferrand*, 6 Barn. & C. 439; *Crisfield v. State*, 55 Md. 192. As a rule, no right of contribution exists between joint wrongdoers. *MERRYWEATHER v. NIXAN*, 8 Term R. 186; *Boyer v. Bolender*, 129 Pa. 324, 18 Atl. 127, 15 Am. St. Rep. 723. But the rule does not apply where one of them is innocent of any intentional or actual wrong, and has been compelled to pay damages which the other, who was the actual wrongdoer, should have paid.

was compelled to pay a legacy duty for which the legatee was ultimately liable, he was allowed to recover the amount from the legatee as money paid for his use.²²

Another class of cases falling under this head are cases in which a person is compelled by the wrong or fraud of another to pay money to a third person. He may recover the amount from the person so guilty of the wrong or fraud.²³ Where, for instance, a member of a firm gives a promissory note, signed in the partnership name, for a debt of his own, and his partner is compelled to pay it, the latter may recover from the former as for money paid to his use;²⁴ and where a carrier, by mistake, delivers goods to the wrong person, and he wrongfully detains them, so that the carrier is compelled to pay their value, he is liable to the carrier for the amount so paid.²⁵

It must be remembered, as already stated, that it is not every payment on another's account that will make the latter liable. No implied promise to repay is raised where a person makes a payment voluntarily, and without any legal liability or compulsion, in discharge of the debt or liability of another;²⁶ nor where he has been compelled to make the payment by his own wrongful act;²⁷ nor where the payment is made in discharge of a liability which is a mere moral liability, and is not recognized in law;²⁸ nor where a payment is made in discharge of another's liability by express agreement with the latter.²⁹ It has further been held that, to entitle a person to recover from another money paid for the latter's use, there must be some privity between them. Legal liability incurred by one person on behalf of an-

In such a case, on equitable principles, contribution may be enforced. *CHURCHILL v. HOLT*, 127 Mass. 165, 34 Am. Rep. 355; *Farwell v. Becker*, 129 Ill. 261, 21 N. E. 792, 6 L. R. A. 400, 16 Am. St. Rep. 267; *Village of Port Jervis v. Bank*, 96 N. Y. 550; *BAILEY v. BUSSING*, 28 Conn. 455.

²² *Foster v. Ley*, 2 Bing. N. C. 269; *Bate v. Payne*, 13 Q. B. 900; *HALES v. FREEMAN*, 1 Brod. & B. 391.

²³ *BLEADEN v. CHARLES*, 7 Bing. 246; *SMITH v. CUFF*, 6 Maule & S. 160; *Horton v. Riely*, 11 Mees. & W. 492; *Van Santen v. Oil Co.*, 81 N. Y. 171.

²⁴ *Cross v. Cheshire*, 7 Exch. 43.

²⁵ *BROWN v. HODGSON*, 4 Taunt. 188. And see *Long Champs v. Kenny*, 1 Doug. 137.

²⁶ *Bates v. Townley*, 2 Exch. 152; *Sleigh v. Sleigh*, 5 Exch. 514. Payment of money by a person to procure the release of his property from seizure for another's debt does not impose any liability on the latter if the seizure was unlawful, or, rather, unless it is shown that it was lawful. *Myers v. Smith*, 27 Md. 91.

²⁷ *Pitcher v. Bailey*, 8 East. 171. Where an officer, for instance, having custody of a prisoner for debt, suffered him to go at large, and, in consequence, was compelled to pay the creditor himself, it was held that he could not recover the amount from the debtor. *Pitcher v. Bailey*, supra.

²⁸ *ATKINS v. BANWELL*, 2 East. 505.

²⁹ Action must be brought on the express agreement. *SPENCER v. PARRY*, 3 Adol. & E. 331; *Lubbock v. Tribe*, 3 Mees. & W. 607.

other, without any concurrence or privity on the part of the latter, will not entitle him to recover for money which, under such circumstances, he may pay to the latter's use. The liability must have been in some way cast upon him by the latter. The mere fact that he has paid, under compulsion of law, what the latter might have been compelled to pay, will give him no right of action against the latter. In an English case, the plaintiff, being entitled under a bill of sale to seize the defendant's goods, did so, but left the goods on the defendant's premises until rent fell due to the defendant's landlord. The landlord distrained the goods, whereupon the plaintiff paid the rent, and sued the defendant for the amount, as having been paid to his use. It was held that the facts gave the plaintiff no right of action. "Having seized the goods under the bill of sale," it was said, "they were his absolute property. He had a right to take them away; indeed, it was his duty to take them away. He probably left them on the premises for his own purposes. * * * At all events, they were not left there at the request, or for the benefit, of the defendant." ³⁰

In all cases, to entitle the plaintiff to recover there must have been a payment, not necessarily of money, but of property at least, accepted as payment and in extinguishment of the claim. The giving of a bond or note, for instance, is not sufficient, for "the mere extinguishment of the original liability by way of new security will not avail." ³¹ It is otherwise, however, if land or other property is transferred absolutely as payment, and in extinguishment of the claim. ³²

MONEY RECEIVED FOR THE USE OF ANOTHER.

281. Wherever one person has money to which, in equity and good conscience, another is entitled, the law creates a promise by the former to pay it to the latter, and the obligation may be enforced by *assumpsit*.

Contracts arising from agreement frequently result in the receipt and holding of money by one of the parties for the use of the other; as, where a person is employed by another as agent to receive money, and to account for and pay over the amount received, and receives money by virtue of his employment. In such a case his obligation

³⁰ *ENGLAND v. MARSDEN*, L. R. 1 C. P. 529. And see *Bay City Bank v. Lindsay*, 94 Mich. 176, 54 N. W. 42. But see *EDMUNDS v. WALLINGFORD*, 14 Q. B. Div. 811; Keener, *Quasi Cont.* 390.

³¹ *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; *Taylor v. Higgins*, 3 East, 170; *Cumming v. Hackley*, 8 Johns. (N. Y.) 202.

³² *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; *Randall v. Rich*, 11 Mass. 494.

results from agreement.³³ In some cases a similar obligation is created by law. The receipt by one person of money to which another person is entitled, under some circumstances, creates a debt without agreement, and even against dissent. The law creates the debt and a promise to pay it. The debt is technically described as a debt "for money received by the defendant for the use of the plaintiff," or "for money had and received." It has been said that such an action will lie whenever the defendant has money to which, in equity and good conscience, the plaintiff is entitled;³⁴ that the action is equitable in its nature, and will lie, generally, wherever a bill in equity would lie.³⁵

The obligation thus created from the receipt of money can arise only in respect of money or what is equivalent to money.³⁶ Goods received by the defendant, for instance, cannot be treated as money, so as to support such an action, so long as they are undisposed of and remain in the defendant's hands;³⁷ but it is otherwise where they have been sold and converted into money by him.³⁸ In such a case the

³³ Ante, p. 508.

³⁴ *Lawson v. Lawson*, 16 Grat. (Va.) 230, 80 Am. Dec. 702; *Barnett v. Warren*, 82 Ala. 557, 2 South. 457; *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394; *Glascock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *O'Fallon v. Boismenu*, 3 Mo. 405, 26 Am. Dec. 678; *Boyett v. Potter*, 80 Ala. 476, 2 South. 534; *Vrooman v. McKaig*, 4 Md. 450, 59 Am. Dec. 85; *Teegarden v. Lewis* (Ind. Sup.) 35 N. E. 24; *O'Conley v. City of Natchez*, 1 Smedes & M. (Miss.) 31, 40 Am. Dec. 87; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575. Money paid on judgment before or pending appeal may be recovered after the judgment is reversed. *Chapman v. Sutton*, 68 Wis. 657, 32 N. W. 683; *CLARK v. PINNEY*, 6 Cow. (N. Y.) 297; *Kalmbach v. Foote*, 79 Mich. 236, 44 N. W. 603; *Haebler v. Myers*, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589; *SCHOLEY v. HALSEY*, 72 N. Y. 578. See, also, *Isom v. Johns*, 2 Munf. (Va.) 272.

³⁵ *CULBREATH v. CULBREATH*, 7 Ga. 64, 50 Am. Dec. 375; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Kennedy v. Insurance Co.*, 3 Har. & J. (Md.) 367, 6 Am. Dec. 499.

³⁶ *Leake*, Cont. 67; *Keener*, Quasi Cont. 139, 170; *Foster v. Dupre*, 5 Mart. (La.) 6, 12 Am. Dec. 466; *Brundage v. Village of Port Chester*, 102 N. Y. 494, 7 N. E. 398; *Lee v. Merritt*, 8 Q. B. 820; *Nightingale v. Devisme*, 5 Burrows, 2589; *Scott v. Miller*, 3 Bing. N. C. 811; *Atkins v. Owen*, 4 Adol. & E. 819; *Balch v. Patten*, 45 Me. 41, 71 Am. Dec. 526; *Libby v. Robinson*, 79 Me. 168, 9 Atl. 24. ³⁷ *Thurston v. Mills*, 16 East, 254; *Hendricks v. Goodrich*, 15 Wis. 679; *Moses v. Arnold*, 43 Iowa, 187, 22 Am. Rep. 239; *Stearns v. Dillingham*, 22 Vt. 624, 54 Am. Dec. 88; *Smith v. Jernigan*, 83 Ala. 256, 3 South. 515; *Tuttle v. Campbell*, 74 Mich. 652, 42 N. W. 384, 16 Am. St. Rep. 652; *Moody v. Walker*, 89 Ala. 619, 7 South. 246.

³⁸ *Leake*, Cont. 50; *Keener*, Quasi Cont. 170; *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Parker v. Crole*, 5 Bing. 63; *UGHTON v. SEPPINGS*, 1 Barn. & Adol. 241; *Staat v. Evans*, 35 Ill. 455; *Notley v. Buck*, 8 Barn. & C. 160; *Olive v. Olive*, 95 N. C. 485; *POWELL v. REES*, 7 Adol. & E. 426; *Comstock v. Hier*, 73 N. Y. 269, 29 Am. Rep. 142; *Barnett v. Warren*, 82 Ala. 557, 2 South. 457; *Thornton v. Strauss*, 79 Ala. 164.

right to recover is based on the receipt by the defendant of money belonging to the plaintiff, and the amount of money received, and not the value of the goods, is the measure of recovery. It follows from this that if the money, or an equivalent, is not received for the goods, even though they may have been sold;³⁹ or if they have been merely exchanged for other goods;⁴⁰ or if the amount cannot be ascertained,⁴¹—the action will not lie. The plaintiff must seek some other remedy.

It has been said that an action for money had and received will not lie unless there is some privity between the plaintiff and the defendant;⁴² but there need be no privity other than such as arises out of the fact that the defendant has received the plaintiff's money, which in equity and good conscience he ought not to retain.⁴³

Same—Debts Arising from Tort—Waiver of Tort.

A frequent illustration of a quasi contractual obligation of this kind arises where a person obtains another's money by wrongful or fraudulent means. Where one person has wrongfully taken another's money, or has taken his property and converted it into money, the latter has a right of action *ex delicto* for the wrong done to him, as by an action of trespass or trover, or by an action on the case for the fraud. He is not always restricted, however, to an action *ex delicto* for the specific wrong, but may in general waive the tort,⁴⁴ and sue in *assumpsit* for the money as for money received for his use.⁴⁵

³⁹ *Budd v. Hiler*, 27 N. J. Law, 43; *Rosenberg v. Block*, 54 N. Y. Super. Ct. 537. Receipt of equivalent. *Miller v. Miller*, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; *Doon v. Ravey*, 49 Vt. 293.

⁴⁰ *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318; *Kidney v. Persons*, 41 Vt. 386, 98 Am. Dec. 595.

⁴¹ *Saville, Simes & Co. v. Welch*, 58 Vt. 683, 5 Atl. 491; *Glasscock v. Hazell*, 109 N. C. 145, 13 S. E. 789.

⁴² *Sergeant v. Stryker*, 16 N. J. Law, 464, 32 Am. Dec. 404.

⁴³ *Walker v. Conant*, 65 Mich. 194, 31 N. W. 786; *Pugh v. Powell* (Pa.) 11 Atl. 570; *Drake v. Whaley*, 35 S. C. 187, 14 S. E. 397.

⁴⁴ This expression is generally used. As pointed out by Prof. Keener, the doctrine of waiver of tort and suit in *assumpsit* is simply a question of the election of remedies. "The remedies in tort and *assumpsit* not being concurrent, a plaintiff is compelled to elect which remedy he will pursue; and,

⁴⁵ *NEATE v. HARDING*, 6 Exch. 349; *Cory v. Freeholders*, 47 N. J. Law, 181; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299; *Loomis v. O'Neal*, 73 Mich. 582, 41 N. W. 701; *People v. Wood*, 121 N. Y. 522, 24 N. E. 952; *Kidney v. Persons*, 41 Vt. 386, 98 Am. Dec. 595; *Lubert v. Chauviteau*, 3 Cal. 458, 58 Am. Dec. 415; *Kiewert v. Rindskopf*, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731; *Western Assur. Co. v. Towle*, 65 Wis. 247, 26 N. W. 104; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Dashaway Ass'n v. Rogers*, 79 Cal. 211, 21 Pac. 742; *O'Conley v. City of Natchez*, 1 Smedes & M. (Miss.) 31, 40 Am. Dec. 87.

The fundamental fact upon which this right of action depends is that the defendant has received money belonging to the plaintiff, or to which the plaintiff is entitled. It is not sufficient to show that the defendant has by fraud or wrong caused the plaintiff to pay money to others than the defendant, or to otherwise sustain loss or damage.⁴⁶ "Assuming a defendant to be a tortfeasor, in order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. That the plaintiff has been impoverished by the tort is not sufficient. If the plaintiff's claim, then, is in reality to recover damages for an injury done, his sole remedy is to sue in tort."⁴⁷

It is impossible for us to go at much length into the different circumstances under which the law will create this obligation. It must suffice to mention the most important.

Where a person steals another's money or property, or obtains it by false pretenses, the fact that a crime has been committed will not prevent a civil action by the person injured. He may sue the thief in tort, or he may elect to sue in assumpsit as for money received for his use.⁴⁸

The same is true in any case in which one person, by means of trespass, fraud, or other tortious means, obtains another's money.⁴⁹

if he elect to sue in assumpsit, he is said to waive the tort." *Keener*, *Quasi Cont.* 159; *COOPER v. COOPER*, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721. If the plaintiff waives the wrongful character of the taking, or makes his election, by recovering the money as a debt, or otherwise, he thereby precludes himself from taking advantage of it as a tort. *Brewer v. Sparrow*, 7 Barn. & C. 310; *Lithgoe v. Vernon*, 5 Hurl. & N. 180; *THOMPSON v. HOWARD*, 31 Mich. 309; *Huffman v. Hughlett*, 11 Lea (Tenn.) 549. He cannot accept the proceeds of his goods which have been wrongfully taken and sold, as a debt, and likewise claim damages for the injury done in the wrongful taking and sale. *Brewer v. Sparrow*, 7 Barn. & C. 310. Moreover, he cannot waive the wrong, or make his election in part only. Therefore, if he accepts part of the proceeds or price of the goods, he is bound to treat the balance as a debt. *Lythgoe v. Vernon*, 5 Hurl. & N. 180. A mere claim to a debt in respect of the value of goods wrongfully obtained, if not acquiesced in by the other party, does not constitute an election so as to waive the tort. *Valpy v. Sanders*, 5 C. B. 886.

⁴⁶ *NATIONAL TRUST CO. v. GLEASON*, 77 N. Y. 400, 33 Am. Rep. 632.

⁴⁷ *Keener*, *Quasi Cont.* 160, citing, among other cases, *Patterson v. Prior*, 18 Ind. 440, 81 Am. Dec. 367; *NATIONAL TRUST CO. v. GLEASON*, 77 N. Y. 400, 33 Am. Rep. 632; *New York Guaranty & Indemnity Co. v. Gleason*, 78 N. Y. 503; *Tightmeyer v. Mongold*, 20 Kan. 90; *Fanson v. Linsley*, Id. 235. And see *Stockett v. Watkins' Adm'rs*, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438.

⁴⁸ *Holt v. Ely*, 1 El. & Bl. 795; *Chowne v. Baylis*, 31 Law J. Ch. 757; *Stone v. Marsh*, 6 Barn. & C. 551; *Hindmarch v. Hoffman*, 127 Pa. 284, 18 Atl. 14, 4 L. R. A. 368, 14 Am. St. Rep. 842; *Litt v. Martindale*, 18 C. B. 314.

⁴⁹ *CATTS v. PHALEN*, 2 How. 376, 11 L. Ed. 306; *Western Assur. Co. v. Towle*, 65 Wis. 247, 26 N. W. 104; *Kiewert v. Rindskopf*, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731; *MARSH v. KEATING*, 1 Bing. N. C. 198;

Same—Money Obtained by Fraud or Duress.

Where a person has obtained money from another under an agreement which the latter has the right to avoid on the ground of fraud, duress, or undue influence, the latter, on avoiding the contract, may recover the amount as money received for his use.⁵⁰

Money obtained by means of duress or compulsion may in like manner be recovered in assumpsit.⁵¹ Duress may consist, as we have seen, in violence or unlawful imprisonment,⁵² or threats of violence⁵³ or unlawful imprisonment,⁵⁴ in which cases it is duress of the person; or it may be duress of goods, as where property is wrongfully taken or withheld under oppressive circumstances.⁵⁵ Further than this, "where money has been obtained * * * by any kind of compulsion or oppression sufficient to render the payment involuntary," it may be recovered as a debt for money received for the use of the plaintiff.⁵⁶

Cory v. Freeholders, 47 N. J. Law, 181; *Burton v. Driggs*, 20 Wall. 125, 22 L. Ed. 299.

⁵⁰ *Thornett v. Haines*, 15 Mees. & W. 367; *Street v. Blay*, 2 Barn. & Adol. 456; *Dashaway Ass'n v. Rogers*, 79 Cal. 211, 21 Pac. 742; *Gompertz v. Denton*, 1 Crompt. & M. 207; *Foster v. Bartlett*, 62 N. H. 617; ante, p. 235.

⁵¹ *Shaw v. Woodcock*, 7 Barn. & C. 73; *Atlee v. Backhouse*, 3 Mees. & W. 633; *CHANDLER v. SANGER*, 114 Mass. 364, 19 Am. Rep. 367; *PRESTON v. CITY OF BOSTON*, 12 Pick. (Mass.) 7. On this subject generally, see ante, p. 240, and cases there collected.

⁵² *De Mesnil v. Dakin*, L. R. 3 Q. B. 18. As we have seen in another connection, even a legal arrest and imprisonment may be duress if there is abuse of process. Ante, p. 242; *Heckman v. Swartz*, 64 Wis. 48, 24 N. W. 473.

⁵³ Ante, p. 241.

⁵⁴ Ante, p. 242. It must be remembered that it is unlawful to compound a felony, and that money paid to stifle a criminal prosecution cannot be recovered, ante, p. 293; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815; *Gotwalt v. Neal*, 25 Md. 434; *Dixon v. Olmstead*, 9 Vt. 310, 31 Am. Dec. 629; unless the circumstances were such that the parties cannot be regarded as being in *pari delicto*, *DUVAL v. WELLMAN*, 124 N. Y. 156, 26 N. E. 343; ante, p. 340.

⁵⁵ Ante, p. 243; *HILLS v. STREET*, 5 Bing. 37; *ASTLEY v. REYNOLDS*, 2 Strange, 915; *CHANDLER v. SANGER*, 114 Mass. 364, 19 Am. Rep. 367; *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178; *PRESTON v. CITY OF BOSTON*, 12 Pick. (Mass.) 7; *PARCHER v. MARATHON CO.*, 52 Wis. 388, 9 N. W. 23, 38 Am. Rep. 745; *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236; *Briggs v. Boyd*, 56 N. Y. 289; *Joannin v. Ogilvie*, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581. Recovery of money exacted by carrier. *Baldwin v. Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277; *Peters v. Railroad Co.*, 42 Ohio St. 275, 51 Am. Rep. 814; *McGregor v. Railway Co.*, 35 N. J. Law, 89.

⁵⁶ *Leake, Cont.* 52, and authorities there collected; *CAREW v. RUTHERFORD*, 106 Mass. 1, 8 Am. Rep. 287; *Bulow v. Goddard*, 1 Nott & McC. (S. C.) 45, 9 Am. Dec. 663; *Westlake & Button v. City of St. Louis*, 77 Mo. 47, 46 Am. Rep. 4; *Lehigh Coal & Nav. Co. v. Brown*, 100 Pa. 338; *SWIFT CO. v. U. S.*, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341; *Regan v. Baldwin*, 126 Mass.

Same—Voluntary Payment.

If a mere claim is made upon a person without any legal proceeding, and he pays it with full knowledge of all the circumstances of the claim, and without any compulsion or necessity, the payment is regarded as voluntary, and cannot be recovered back, though the claim was unfounded, and might have been successfully resisted.⁵⁷ It seems that it was at one time held that money voluntarily paid could be recovered back if the party receiving it was not entitled to it;⁵⁸ but it is now virtually settled "that a party may in equity and good conscience continue to hold money voluntarily paid to him under no mistake of fact, and without fraud upon his part."⁵⁹

Same—Liability of Third Persons.

If money wrongfully obtained has passed into the hands of a third person, the law will create a similar promise by him, unless he was a bona fide purchaser or recipient for value; that is, unless he gave a valuable consideration for the money, and had no notice of the fraud or other wrong by which it was obtained.⁶⁰ If he was a bona fide purchaser or recipient, he is not liable.⁶¹ The same is true where goods wrongfully obtained or converted have passed into the hands of a third person, and been converted into money.⁶²

Same—Money Received without Fraud or Wrong.

The right to recover money as having been received by the defendant for the use of the plaintiff is not limited to cases in which the money has been obtained by a tortious act, but extends to many cases in which it has been rightfully obtained, but cannot be rightfully

485, 30 Am. Rep. 689. Mere threat of suit is not compulsion so as to render a payment to prevent suit involuntary. *Emmons v. Scudder*, 115 Mass. 367; *Awalt v. Association*, 34 Md. 435.

⁵⁷ *Leake*, Cont. 56; *Spragg v. Hammond*, 2 Brod. & B. 59; *Denby v. Moore*, 1 Barn. & Ald. 123; *Morris v. Tarin*, 1 Dall. 147, 1 L. Ed. 76, 1 Am. Dec. 233; *Hall v. Shultz*, 4 Johns. (N. Y.) 240, 4 Am. Dec. 270; *Awalt v. Association*, 34 Md. 435.

⁵⁸ *MOSES v. MACFERLAN*, 1 W. Bl. 219.

⁵⁹ *BRISBANE v. DACRES*, 5 Taunt. 144; *Regan v. Baldwin*, 126 Mass. 485, 30 Am. Rep. 689; *Benson v. Monroe*, 7 Cush. (Mass.) 125, 54 Am. Dec. 716.

⁶⁰ *Calland v. Loyd*, 6 Mees. & W. 26; *Bayne v. U. S.*, 93 U. S. 642, 23 L. Ed. 997; *Mason v. Prendergast*, 120 N. Y. 536, 24 N. E. 806; *Atlantic Cotton Mills v. Orchard Mills*, 147 Mass. 268, 17 N. E. 496, 9 Am. St. 698; *Hindmarch v. Hoffman*, 127 Pa. 284, 18 Atl. 14, 4 L. R. A. 368, 14 Am. St. Rep. 842; *Harrison Mach. Works v. Coquillard*, 26 Ill. App. 513; ante, p. 234.

⁶¹ *Foster v. Green*, 7 Hurl. & N. 881. And see *Thacher v. Pray*, 113 Mass. 291, 18 Am. Rep. 480; *Newhall v. Wyatt*, 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712; *Stephens v. Board*, 79 N. Y. 187, 35 Am. Rep. 511; *State Nat. Bank v. U. S.*, 114 U. S. 401, 5 Sup. Ct. 888, 29 L. Ed. 149.

⁶² *Glyn v. Baker*, 13 East. 509; *Graham v. Dyster*, 6 Maule & S. 1; *Down v. Halling*, 4 Barn. & C. 330.

kept.⁶³ Where a person, for instance, has obtained money from another under an agreement which the latter is entitled to avoid, and does avoid, because of want or failure of consideration,⁶⁴ or because of mistake,⁶⁵ or because of want of capacity by reason of infancy or insanity,⁶⁶ or because of the other party's failure to perform his part of the agreement,⁶⁷ the money may be recovered. The money, though obtained without wrong, cannot be rightfully and justly withheld after the contract has been avoided, and the law therefore creates an obligation to repay it.

Same—Money Paid under a Mistake.

An important class of cases in which an action will lie as for money received by the defendant for the use of the plaintiff is where money is paid under a mistake of fact. As a rule, whenever a person makes a payment to another under such a mistake as to material facts as to create a belief in the existence of a liability to pay which does not really exist, the money may be recovered back as having been received by the person to whom it was paid for the use of the person paying it.⁶⁸ If the mistake is caused by the fraud of the person receiving the money, or if he knows of the mistake when he receives the money, the case will fall within the class which we have already considered.⁶⁹ We are speaking here of cases in which the mistake is not induced by fraud, and in which both parties may act in perfect good faith. Such an obligation arises where money is paid as due upon the basis of erroneous accounts, and upon a true statement of account is found not to have been due. It may be recovered as money received for the plaintiff's use.⁷⁰ The money must have been paid under the belief that it was due. If the plaintiff knew that it was not due, and voluntarily paid it because he thought he could not show that it was not due, or

⁶³ *Johnson's Ex'x v. Jennings' Adm'r*, 10 Grat. (Va.) 1, 60 Am. Dec. 323.

⁶⁴ Post, p. 544. ⁶⁵ Post, p. 542; ante, p. 196. ⁶⁶ Ante, pp. 175, 184.

⁶⁷ *Philipson v. Bates' Ex'r*, 2 Mo. 116, 22 Am. Dec. 444; post, p. 544.

⁶⁸ *BIZE v. DICKASON*, 1 Term R. 285; *Citizens' Bank v. Grafflin*, 31 Md. 507, 1 Am. Rep. 66; *Barber v. Brown*, 1 C. B. (N. S.) 121; *MILNES v. DUNCAN*, 6 Barn. & C. 671; *Mills v. Guardians of the Poor*, 3 Exch. 590; *Mayer v. City of New York*, 63 N. Y. 455; *Rheel v. Hicks*, 25 N. Y. 289; *Hazard v. Insurance Co.*, 7 R. I. 429; *Holtz v. Schmidt*, 59 N. Y. 253; *Clark v. Sylvester (Me.)* 13 Atl. 404; *McDonald v. Lynch*, 59 Mo. 350; *Glenn v. Shannon*, 12 S. C. 570.

⁶⁹ *SHARKEY v. MANSFIELD*, 90 N. Y. 227, 43 Am. Rep. 161. This distinction, for several reasons, may become important. Where there is no fraud, for instance, a demand before suit is necessary; but where there is fraud (and it amounts to fraud if the other party knew of the mistake), demand is not necessary. *SHARKEY v. MANSFIELD*, supra; *Taylor v. Spears*, 6 Ark. 381, 44 Am. Dec. 519.

⁷⁰ *Dalls v. Lloyd*, 12 Q. B. 531; *TOWNSEND v. CROWDY*, 8 C. B. (N. S.) 477; *STUART v. SEARS*, 119 Mass. 143; *Keenholts v. Church*, 57 Hun, 589, 10 N. Y. Supp. 615.

for any other reason, it cannot be recovered back. This is not ignorance of fact, but ignorance of the means of proving a fact.⁷¹ The mere fact that the party paying the money suspects that it is not due does not bring the case within this rule. He must believe it is not due.⁷² It is essential that there shall have been a mistake of a material fact. A voluntary payment with knowledge of all facts cannot be recovered, even though there may have been no obligation to pay.⁷³ By the weight of authority, if the mistake occurs and causes the payment, it is immaterial that it arose from negligence or want of diligent inquiry on the part of the plaintiff, or from forgetfulness, or the fact that he had the means of knowledge;⁷⁴ provided, however, the defendant has not so changed his position that he cannot be placed in statu quo.⁷⁵ If the money is intentionally paid "without reference to the truth or falsehood of the fact. the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false," it cannot be recovered.⁷⁶

A person cannot recover money paid under a mistake of fact if he has received the equivalent for which he bargained, so that there is no failure of consideration; and it is immaterial that he need not, and would not, have made the payment if he had known the true state of facts. Where a bank, for instance, pays the check of a depositor under the erroneous belief that it has sufficient funds, it may recover from the payee the excess paid him over the amount to the depositor's

⁷¹ Keener, Quasi Cont. 26; *Windbiel v. Carroll*, 16 Hun (N. Y.) 101.

⁷² Keener, Quasi Cont. 28.

⁷³ *Adams v. Reeves*, 68 N. C. 134, 12 Am. Rep. 627.

⁷⁴ *KELLY v. SOLARI*, 9 Mees. & W. 54; *APPLETON BANK v. MCGILVERAY*, 4 Gray (Mass.) 518, 64 Am. Dec. 92; *Devine v. Edwards*, 101 Ill. 138; *Lawrence v. Bank*, 54 N. Y. 432; *Bell v. Gardiner*, 4 Man. & G. 11; *TOWNS- END v. CROWDY*, 8 C. B. (N. S.) 477; *Waite v. Leggett*, 8 Cow. (N. Y.) 195, 18 Am. Dec. 441; *KINGSTON BANK v. ELTINGE*, 40 N. Y. 391, 100 Am. Dec. 516; *Brown v. Road Co.*, 56 Ind. 110; *Rutherford v. McIvor*, 21 Ala. 750; *Baltimore & S. R. Co. v. Faunce*, 6 Gill (Md.) 68, 46 Am. Dec. 655; *Koontz v. Bank*, 51 Mo. 275; *Walker v. Conant*, 65 Mich. 194, 31 N. W. 786. *Contra*, *Brummitt v. McGuire*, 107 N. C. 351, 12 S. E. 191; *Wilson v. Barker*, 50 Me. 447.

⁷⁵ Keener, Quasi Cont. 71; *Walker v. Conant*, 65 Mich. 194, 31 N. W. 786.

⁷⁶ *KELLY v. SOLARI*, 9 Mees. & W. 54; *McARTHUR v. LUCE*, 43 Mich. 435, 5 N. W. 451, 38 Am. Rep. 204; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; *Buffalo v. O'Malley*, 61 Wis. 255, 20 N. W. 913, 50 Am. Rep. 137; *Bergenthal v. Fiebrantz*, 48 Wis. 435, 4 N. W. 89; *Troy v. Bland*, 58 Ala. 197. A compromise, therefore, cannot be repudiated, and money paid recovered, on the ground of mistake, where it was made without reference to the truth or falsity of facts. See cases above cited. But it is otherwise if there was mistake as to a fact which was believed to be true, and on the belief in the truth of which the compromise was made. *Rheel v. Hicks*, 25 N. Y. 289; *WHEADON v. OLDS*, 20 Wend. (N. Y.) 174; *STUART v. SEARS*, 119 Mass. 143.

credit, but it cannot recover the full amount paid. And it makes no difference that because of the overdraft it had a right to refuse to pay anything on the check.⁷⁷

It is almost universally held that a payment under a mistake of law cannot be recovered, for no man can plead ignorance of the law. If a person, therefore, voluntarily pays a claim made upon him with full knowledge of all the circumstances, but under a mistake of law, he cannot recover the money paid on the ground that he was not legally liable, and could have successfully resisted the claim if he had understood his legal rights.⁷⁸ Mistake, therefore, of a fact, the truth or falsity of which is immaterial, does not entitle one to recover money paid. "A plaintiff paying a claim, supposing himself to be under an obligation to pay the same because of mistake as to a fact which, if true, would not have imposed an obligation upon him, cannot recover the money so paid in jurisdictions where a recovery is not allowed of money paid under mistake of law, since, had the plaintiff known the law, the fact about which he was mistaken would not have induced him to make the payment."⁷⁹ We have, in treating of the formation of contract, shown the general exceptions to the rule that ignorance of law cannot be shown, and it will suffice to refer to what is there said.

Same—Want or Failure of Consideration—Failure of Other Party to Perform.

We may class with payments made under mistake payments which are allowed to be recovered because of want or failure of consideration, for in all cases where a recovery is allowed on this ground there has been a misapprehension. The party who has paid the money has not

⁷⁷ Keener, Quasi Cont. 34, where the question is considered at length. And see *MERCHANTS' NAT. BANK v. BANK*, 139 Mass. 513, 2 N. E. 89; *Badeau v. U. S.*, 130 U. S. 439, 9 Sup. Ct. 579, 32 L. Ed. 997; *Lemans v. Wiley*, 92 Ind. 436.

⁷⁸ *BILBIE v. LUMLEY*, 2 East, 469; *Vanderbeck v. City of Rochester*, 122 N. Y. 285, 25 N. E. 408; *CLARKE v. DUTCHER*, 9 Cow. (N. Y.) 674; *Denby v. Moore*, 1 Barn. & Ald. 123; *BRISBANE v. DACRES*, 5 Taunt. 143; *Wayne Co. v. Randall*, 43 Mich. 137, 5 N. W. 75; *Birkhauser v. Schmitt*, 45 Wis. 316, 30 Am. Rep. 740; *Carson v. Cochran*, 52 Minn. 67, 53 N. W. 1130; *Valley Ry. Co. v. Iron Co.*, 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219; *Porter v. Jefferies*, 40 S. C. 92, 18 S. E. 229; *Mutual Sav. Inst. v. Enslin*, 46 Mo. 200; *Trigg v. Read*, 5 Humph. (Tenn.) 529, 42 Am. Dec. 447; *Snelson v. State*, 16 Ind. 29; *Hubbard v. Martin*, 8 Yerg. (Tenn.) 498; *Real Estate Sav. Inst. v. Linder*, 74 Pa. 371; *Townsend v. Cowles*, 31 Ala. 428; *Newell v. March*, 30 N. C. 441; *Christy v. Sullivan*, 50 Cal. 337; *Osburn v. Throckmorton*, 90 Va. 311, 18 S. E. 285; ante, p. 206. *Contra*, *Mansfield v. Lynch*, 59 Conn. 320, 22 Atl. 313, 12 L. R. A. 285; ante, p. 206.

⁷⁹ Keener, Quasi Cont. 32; citing *Needles v. Burk*, 81 Mo. 569, 51 Am. Rep. 251; *Langevin v. City of St. Paul*, 49 Minn. 189, 51 N. W. 817, 15 L. R. A. 766; ante, p. 206.

gotten what he supposed, or had a right to suppose, he was getting, or would get, in return for his money. Thus, where a person bought a bar of silver by weight, and, by an error in assaying it, paid for a greater weight than it contained, he was allowed to recover the excess from the seller as money received for his use.⁸⁰ It needs no argument to show that this is a case of mistake. In like manner, if the purchaser of goods has paid the price, and the seller fails to deliver the goods, the purchaser may recover the money paid as money received for his use.⁸¹ And in any case where a person has paid money under an agreement which he is entitled to rescind, and does rescind, for want or failure of consideration, he may recover what he has paid.⁸² The action will lie, for instance, against a person who sells goods as his own, but which are not his own, where the real owner subsequently claims them from the purchaser;⁸³ or against a person who sells bills, notes, bonds, stock, or other securities, which turn out to be forgeries, or for some other reason to be worthless;⁸⁴ or against a person who contracts to transfer the title to land, where because of his want of title, or for other reasons, no title passes.⁸⁵

As a rule, the failure of consideration must be total in order to entitle a person to recover money paid under a contract. If he has in fact received a part of the consideration, so that the failure of consideration is only partial, his remedy, if he has any, is for breach of the contract under which the money was paid.⁸⁶ This is in accord with the rule which we have heretofore stated,—that money paid under a mistake cannot be recovered if an equivalent has been received. Where a specific article is sold with a warranty of its quality, and is

⁸⁰ *Cox v. Prentice*, 3 Maule & S. 344. And see *Devine v. Edwards*, 101 Ill. 138; *Noyes v. Parker*, 64 Vt. 379, 24 Atl. 12.

⁸¹ *GILES v. EDWARDS*, 7 Term R. 181; *Devaux v. Conolly*, 8 C. B. 640.

⁸² *CLAFLIN v. GODFREY*, 21 Pick. (Mass.) 1; *Newsome v. Graham*, 10 Barn. & C. 234; *GILES v. EDWARDS*, 7 Term R. 181; *Johnson's Ex'x v. Jennings' Adm'r*, 10 Grat. (Va.) 1, 60 Am. Dec. 323; *Earle v. Bickford*, 6 Allen (Mass.) 549, 83 Am. Dec. 651.

⁸³ *EICHOLZ v. BANNISTER*, 34 Law J. C. P. 105; ante, p. 468.

⁸⁴ *CLAFLIN v. GODFREY*, 21 Pick. (Mass.) 1; *Ripley v. Case*, 86 Mich. 261, 49 N. W. 46; *Westropp v. Solomon*, 8 C. B. 345; *JONES v. RYDE*, 5 Taunt. 488; *GURNEY v. WOMERSLEY*, 4 El. & Bl. 133; *Watson v. Cresap*, 1 B. Mon. (Ky.) 195, 36 Am. Dec. 572; *YOUNG v. COLE*, 3 Bing. N. C. 724; *Burchfield v. Moore*, 3 El. & Bl. 683; *Moore v. Garwood*, 4 Exch. 681; *WOOD v. SHELTON*, 42 N. J. Law, 421, 36 Am. Rep. 523; ante, p. 468.

⁸⁵ *CRIPPS v. READE*, 6 Term R. 606; *Schwinger v. Hickok*, 53 N. Y. 280; *Earle v. Bickford*, 6 Allen (Mass.) 549, 83 Am. Dec. 651; *Wright v. Dickinson*, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602. And see *McGoren v. Avery*, 37 Mich. 120; *Merryfield v. Willson*, 14 Tex. 224, 65 Am. Dec. 117; ante, p. 470. See *Keener*, Quasi Cont. 125.

⁸⁶ *HUNT v. SILK*, 5 East, 783; *Rand v. Webber*, 64 Me. 191; *Blackburn v. Smith*, 2 Exch. 783; *Harnor v. Groves*, 15 C. B. 667; *Smart v. Gale*, 62 N. H. 62.

not altogether worthless, a mere breach of the warranty does not entitle the purchaser to recover the price paid. His remedy is by action for damages for breach of warranty.⁸⁷ Where the consideration is severable, however, so that the money paid for a portion of it may be ascertained, a partial failure may entitle the plaintiff to recover the part of the money paid in respect of that part of the consideration which has failed.⁸⁸

A person can never recover money paid on the ground that the consideration has failed, if he has obtained the specific consideration which he bargained for, though it may turn out to be of no value;⁸⁹ as, for instance, where he has bought land or goods, intending to take his chances as to the seller's title, or where he has bought stock, bonds, or other property, and taken the chance of their being of value.⁹⁰ There must, as we have said, have been a misapprehension.

Where the failure of consideration was caused by the default of the plaintiff, he cannot recover the money paid for it.⁹¹

Same—Money Paid under Illegal Contract.

Though, as we have seen, no action will lie to enforce an illegal contract, an action will be allowed, under some circumstances, in disaffirmance of it. Ordinarily, where one of the parties has paid money under an illegal contract, he cannot sue to recover it back. The law will leave him where he has placed himself.⁹² To this rule, as we have seen, there are some exceptions. Where the contract is still executory, except for a payment of money made by one of the parties to the other, and is not of such a character that the illegal object is effected by the mere payment, and is *malum prohibitum*, and not *malum in se*, there is a *locus pœnitentiæ*, and the party who has paid the money may withdraw from the contract, and recover what he has paid as money received for his use.⁹³ The law creates a quasi contractual obligation, on the part of the party who has received the money, to repay it. Another exception is where the parties are not in *pari delicto*. Where the party who has paid money under an illegal contract entered into the contract under the influence of fraud or strong pressure, or where the law which makes the contract unlawful was intended for his

⁸⁷ *Gompertz v. Denton*, 1 Crompt. & M. 207.

⁸⁸ *Devaux v. Conolly*, 8 C. B. 640; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Lafin v. Howe*, 112 Ill. 253.

⁸⁹ *Westlake v. Adams*, 5 C. B. (N. S.) 266; *TAYLOR v. HARE*, 1 Bos. & P. (N. R.) 260; *Lambert v. Heath*, 15 Mees. & W. 486; ante, p. 469.

⁹⁰ *MORLEY v. ATTENBOROUGH*, 3 Exch. 500; *Lambert v. Heath*, 15 Mees. & W. 486; *Westlake v. Adams*, 5 C. B. (N. S.) 266.

⁹¹ *Stray v. Russell*, 1 El. & El. 888, 916.

⁹² *HOLMAN v. JOHNSON*, 1 Cowp. 341; *Tuoro v. Cassin*, 1 Nott & McC. (S. C.) 173; *Waite v. Merrill*, 4 Greenl. (Me.) 102, 16 Am. Dec. 238; ante, p. 336.

⁹³ Ante, p. 338.

protection, he is not regarded as being in *pari delicto* with the other party, and may recover what he has paid.⁹⁴

RECOVERY FOR BENEFITS CONFERRED.

282. Under certain circumstances, where one person has conferred upon another benefits in the way of property, services, etc., and cannot show a promise in fact by the latter to pay for them, the law will create an obligation, because of the receipt of the benefits, to pay what they are reasonably worth.

As we have seen, if a man delivers goods to another, or performs services for him, not under such circumstances as to lead the latter to believe them a gift, and the latter accepts them or acquiesces, a promise to pay for them will be implied as a fact. Here there is a true contract shown by the conduct of the parties. Goods may be delivered, however, or services rendered, under circumstances showing that there is no agreement in fact, or that, though there was an agreement, a condition has not been performed by one of the parties so as to entitle him to sue the other on it, or for some reason it is unenforceable, or is illegal. Under these circumstances the law will sometimes create an obligation to pay for the goods delivered or services rendered.⁹⁵ There has, in these cases, been an agreement in fact, which for some reason will not support an action, and the goods have been delivered, or the services rendered, under this agreement. It needs no argument to show that you cannot imply as a fact any other promise to pay than the unenforceable promise proven to have been made. The question is one of evidence, and the promise shown to have been made in fact prevents the implication of any other promise in fact. Any implied promise to pay must be implied as a matter of law, or created by the law, and must therefore be quasi contractual, and not contractual. We cannot go at much length into the various circumstances under which such a promise will be created, but will mention some of the most important.

Same—Liability for Necessaries.

We have seen that, though an infant or an insane or drunken person is ordinarily incapable of making a contract which will bind him, he is liable for necessities furnished him. He is not liable for what he may have agreed to pay for them, but only for what they are worth. It would seem from this that the promise is one created by law, and therefore quasi contractual.⁹⁶ To so regard it would make the law

⁹⁴ Ante, p. 340.

⁹⁵ VAN DEUSEN v. BLUM, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; TURNER v. WEBSTER, 24 Kan. 38, 36 Am. Rep. 251.

⁹⁶ Keener, Quasi Cont. 20; ante, p. 159; Rhodes v. Rhodes, 44 Ch. Div. 94; SCEVA v. TRUE, 53 N. H. 627; TRAINER v. TRUMBULL, 141 Mass.

more consistent. It does not seem consistent to say that because of the immature judgment of an infant, or because of the diseased mind of a lunatic, he cannot consent, and therefore cannot enter into a binding agreement, and to say in the next breath that he may bind himself for necessities. It is better to say that the law makes him liable for necessities. As we have seen, however, many of the courts regard the liability as based upon the express promise. They allow an action, for instance, on a note, or other express promise, given for necessities, provided it is such that the consideration may be inquired into, so that the recovery may be limited to what the necessities are reasonably worth.⁹⁷

We have also seen that, where a husband leaves his wife without means of support, the law gives her authority to pledge his credit to obtain necessities. Not only is this true, but the law will hold a husband liable in assumption for necessities furnished his abandoned wife while she is unconscious, and will hold an insane or infant husband liable for necessities furnished his wife. The liability thus imposed upon the husband is imposed by law without his consent, and is clearly quasi contractual.⁹⁸ Under like circumstances a man may be liable for necessities furnished his children.⁹⁹

Same—Forcing Benefit upon Another.

Neither a liability *ex contractu* nor a liability *quasi ex contractu* can be imposed upon a person otherwise than by his act or consent. One man cannot force a benefit upon another without his knowledge or consent, and then compel him to pay for it.¹⁰⁰ If a person intentionally and knowingly performs services for another, or otherwise confers a benefit upon him, without his knowledge, so that he has no opportunity to refuse the benefit, the law will not create a liability to pay for it.¹⁰¹ So, where a person supplies another with goods, the latter supposing that he is being supplied by another person with whom he has con-

527, 6 N. E. 761; *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 153; *Earle v. Reed*, 10 Metc. (Mass.) 387.

⁹⁷ Ante, p. 159.

⁹⁸ Ante, p. 158; *Cunningham v. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Chapple v. Cooper*, 13 Mees. & W. 252; *Turner v. Frisby*, 1 Strange, 168.

⁹⁹ *Gilley v. Gilley*, 79 Me. 292, 9 Atl. 623, 1 Am. St. Rep. 307; *Van Valkinburgh v. Watson*, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; *People v. Moores*, 4 Denio (N. Y.) 518, 47 Am. Dec. 272; *In re Ryder*, 11 Paige (N. Y.) 185, 42 Am. Dec. 109. But see *Kelley v. Davis*, 49 N. H. 187, 6 Am. Rep. 499.

¹⁰⁰ Ante, pp. 349, 350.

¹⁰¹ *BARTHOLOMEW v. JACKSON*, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; *Dunbar v. Williams*, 10 Johns. (N. Y.) 249; *Glenn v. Savage*, 14 Or. 567, 13 Pac. 442; *EARLE v. COBURN*, 130 Mass. 596; *Shaw v. Graves*, 79 Me. 166, 8 Atl. 884.

tracted for the goods, the law not only will not imply a promise in fact to pay for the goods, but it will not even create a promise.¹⁰²

Same—Benefits Rendered Gratuitously.

If benefits are conferred gratuitously, the law will not create a promise to pay for them, even though they may have been requested.¹⁰³ A person, for instance, who has rendered services for another in the absence of any intention of charging for them on the one side, or of paying for them on the other, cannot afterwards recover for them. Where necessities are furnished to an infant, or an unconscious person, with the intention of charging for them, the law, as we have seen, will create a promise to pay their reasonable value. Where, however, there is no intention at the time to charge for the necessities furnished, the law will not create a liability.

Same—Goods Wrongfully Obtained—Waiver of Tort.

We have seen that, where goods are wrongfully obtained and converted into money, an action will lie by the owner to recover the money received as money received for his use. Such an action does not lie where the goods are retained by the wrongdoer, and not sold. As to whether, in such a case, the owner must sue in tort, as he may do, of course, or whether he may waive the tort, and sue in assumpsit for the value of the goods as upon a fictitious sale, the authorities are conflicting. Some courts allow such an action,¹⁰⁴ while others do not.¹⁰⁵

Same—Part Performance of Contract.

As we have seen in treating of discharge of contract by breach, a party to a contract is not discharged from liability to perform by the

¹⁰² BOSTON ICE CO. v. POTTER, 123 Mass. 28, 25 Am. Rep. 9; Schmalzing v. Thomlinson, 6 Taunt. 147.

¹⁰³ Disbrow v. Durand, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678; Brown v. Tuttle, 80 Me. 162, 13 Atl. 583; COOPER v. COOPER, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721; Doyle v. Trinity Church, 133 N. Y. 372, 31 N. E. 221; Patterson v. Collar, 31 Ill. App. 340; Collar v. Patterson, 137 Ill. 403, 27 N. E. 604; ante, p. 41.

¹⁰⁴ RUSSELL v. BELL, 10 Mees. & W. 340; Willson v. Foree, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Toledo, W. & W. Ry. Co. v. Chew, 67 Ill. 378; Aldine Mfg. Co. v. Barnard, 84 Mich. 632, 48 N. W. 280; Goodwin v. Griffiths, 88 N. Y. 629; Walker v. Duncan, 68 Wis. 624, 32 N. W. 689; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Blalock v. Phillips, 38 Ga. 216; DIETZ'S ASSIGNEE v. SUTCLIFFE, 80 Ky. 650; Morford v. White, 53 Ind. 547; Newton Mfg. Co. v. White, 53 Ga. 395; Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313; Logan v. Wallis, 76 N. C. 416.

¹⁰⁵ Jones v. Hoar, 5 Pick. (Mass.) 285; Allen v. Ford, 19 Pick. (Mass.) 217; Androscoggin Water Power Co. v. Metcalf, 65 Me. 40; Bethlehem Borough v. Fire Co., 81 Pa. 445; Sandeen v. Railroad Co., 79 Mo. 278; Galloway v. Holmes, 1 Doug. (Mich.) 330 (but see Aldine Mfg. Co. v. Barnard, supra); Winchell v. Noyes, 23 Vt. 303; Strother's Adm'r v. Butler, 17 Ala. 733; FERGUSON v. CARRINGTON, 9 Barn. & C. 59. But see RUSSELL v. BELL, 10 Mees. & W. 340.

failure of the other party to perform a part of his promise which is merely subsidiary, and does not go to the essence of the contract; nor, where a contract consists of several promises based on several considerations, so that the promises are divisible, does a failure to perform one or more discharge the other party from liability to pay for those that have been performed. In these cases the party thus partially in default may recover for what he has done, leaving the other party to recover damages from him for his partial breach. The recovery is on the contract itself. Where, however, the breach is not merely of a subsidiary promise, or of one or more of several promises, but of a term which the parties regarded as of the essence of the contract, or there is a failure to fully perform an indivisible promise, the question arises whether the other party is liable for the benefits he has received from the partial performance. That he is not liable on the contract itself is clear, for he can only recover on it by showing that he has substantially performed what he has agreed to perform as a condition precedent to the other's liability. The other party has not agreed to pay him for a partial performance, and any liability must be created by the law without agreement, or quasi ex contractu.

Under certain circumstances such a liability is created. The right to recover is based, not on principles of the law of contract, but on equitable principles; and it would be beyond the scope of our work to go into the subject at any length. It must suffice to call attention to a few of the most important cases in which such a recovery has been allowed. Where a person has willfully refused or failed to fully perform a contract which he was bound to perform, it is clear that he should not, and cannot, recover, for what he has performed under it.¹⁰⁶ If his default was not willful, but because of sickness, death, prevention by the other party, or any other cause, not arising from his own fault, and excusing the breach, then he can recover from the other party on a promise created by the law to pay for the benefits he has received from the part performance.¹⁰⁷ And, by the weight of authority, where one

¹⁰⁶ Ante, pp. 431, 461, 462, and cases cited in notes 177, 178.

¹⁰⁷ *Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388; *Robinson v. Davison*, L. R. 6 Exch. 269; *Boast v. Firth*, L. R. 4 C. P. 1; *SPALDING v. ROSA*, 71 N. Y. 40, 27 Am. Rep. 7; *JONES v. JUDD*, 4 N. Y. 412; *LAKEMAN v. POLLARD*, 43 Me. 463, 69 Am. Dec. 77; *Green v. Gilbert*, 21 Wis. 395; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189; *Martus v. Houck*, 39 Mich. 431, 33 Am. Rep. 409; *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57; *Pinches v. Lutheran Church*, 55 Conn. 183, 10 Atl. 264; *Shultz v. Johnson*, 5 B. Mon. (Ky.) 497; *Adams v. Crosby*, 48 Ind. 153; *Harrington v. Iron-Works Co.*, 119 Mass. 82; *Stewart v. Loring*, 5 Allen (Mass.) 306, 81 Am. Dec. 747; *Fuller v. Brown*, 11 Mete. (Mass.) 440; *HAYWARD v. LEONARD*, 7 Pick. (Mass.) 181, 19 Am. Dec. 269; *SCULLY v. KIRKPATRICK*, 79 Pa. 324, 21 Am. Rep. 62; *Allen v. Baker*, 86 N. C. 91, 40 Am. Rep. 444; *Gilman v. Hall*, 11 Vt. 510, 34 Am. Dec. 700; *Fenton v. Clark*, 11 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645;

of the parties to a contract has endeavored in good faith to perform it, and has substantially done so, and thereby conferred a substantial benefit on the other party, though he has failed to perform the contract in some particulars, he may recover what the partial performance is reasonably worth, having regard, however, to the contract price.¹⁰⁸

If, by the express terms of the contract, there is no liability except upon a full performance, there can be no recovery for a part performance, even where the contract is divisible, and a full performance is prevented by death or other cause beyond the control of the parties. The terms of the express contract exclude the arising of any such implied contract as could form the basis of a claim upon a quantum meruit.¹⁰⁹

Same—Retaining Benefits.

Where benefits are conferred by one person on another under such circumstances as to raise no promise in fact or in law to pay for them, he may nevertheless become liable by retaining them. If a person, for instance, were to receive goods from another, reasonably but mistakenly believing them to be intended as a gift, and, after learning of his mistake, should retain them, when he might return them, or, by the weight of authority, if he should receive part of the goods purchased from another, and retain them after failure of the latter to supply the rest of the goods, the law would compel him to pay for them.¹¹⁰ And the same rule would apply where benefits are in any other way received under such circumstances as to create no contractual obligation, and are retained when they should in justice be returned. If, however, the benefits thus received are incapable of being returned, as where they consist of services, or of material which has been used in repairing a house,¹¹¹ it would seem that no liability should be created. If a man engages a servant for a specified time, and agrees to pay him if he works for that time, his rendition of the services is a condition precedent to his right to recover for them on the contract. If he leaves his employer's service, without excuse, before the time has expired, he certainly cannot recover on the contract without a violation of the plainest principles of the law of contract. The master cannot return the benefit he has received from the part performance, and he should not be held liable to pay for it. Some courts allow the servant to re-

YERRINGTON v. GREEN, 7 R. I. 589, 84 Am. Dec. 578; Norris v. School Dist., 12 Me. 293, 28 Am. Dec. 182; Wadleigh v. Town of Sutton, 6 N. H. 15, 23 Am. Dec. 704; Mooney v. Iron Co., 82 Mich. 263, 46 N. W. 376; ante, p. 468.

¹⁰⁸ Ante, p. 431.

¹⁰⁹ Cutter v. Powell, 6 Term R. 320.

¹¹⁰ OXENDALE v. WETHERELL, 9 B. & C. 286, and cases cited, ante, p. 453, note 145. But see, contra, CHAMPLIN v. ROWLEY, 18 Wend. 187, and cases cited, ante, p. 468, note 453.

¹¹¹ Ante, p. 431.

cover on the quantum meruit, though he has broken his contract without excuse. The weight of authority, however, is to the contrary.¹¹²

Same—Part Performance of Illegal Contract.

Difficult questions have arisen where it has been sought to recover for benefits conferred under an illegal contract. We have already seen that an action for money had and received will lie to recover money paid under an illegal contract which has not been carried out, provided the illegal object has not been effected by the mere payment of the money, and provided the object is *malum prohibitum*, and not *malum in se*. We have also seen that in certain cases the parties to an illegal contract are not regarded as being in *pari delicto*, and that the person who is the less guilty is allowed to recover what he has paid under the contract. So, also, where a person has performed services under an illegal contract, and he is not in *pari delicto* with the other party, he may be allowed to recover what the services are worth. Where an illegal contract has been performed, and the illegal object effected, neither party, if he knew of the illegality, can recover for the benefits conferred upon the other.

Same—Part Performance of Unenforceable or Void Agreement.

Where an agreement is not illegal, but merely void, or unenforceable, and one of the parties refuses to perform his promise after performance or part performance by the other, the law will create a promise to pay for the benefits received. If a man delivers goods, or conveys land, or renders services for another under a contract which is void or unenforceable, but not illegal, he may recover on the quantum valebat or quantum meruit.¹¹³ Such is the case with contracts which are unenforceable because of noncompliance with the statute of frauds.¹¹⁴

A party, however, who has partly performed a contract which is merely unenforceable and not illegal, cannot, by the weight of authority, abandon it, and recover for the part performance, if the other party is willing to carry out the contract.¹¹⁵

¹¹² Ante, p. 462.

¹¹³ Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254; Patten v. Hicks, 43 Cal. 509; Rebman v. Water Co., 95 Cal. 390, 30 Pac. 564; Ellis v. Cory, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881; Smith v. Wooding, 20 Ala. 324; Little v. Martin, 3 Wend. (N. Y.) 219, 20 Am. Dec. 688; Montague v. Garnett, 3 Bush (Ky.) 297; ante, p. 95.

¹¹⁴ See cases above cited.

¹¹⁵ Philbrook v. Belknap, 6 Vt. 383; Galway v. Shields, 66 Mo. 313, 27 Am. Rep. 351; Ketchum v. Evertson, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384; Collier v. Coates, 17 Barb. (N. Y.) 473; Greton v. Smith, 33 N. Y. 245; Nelson v. Shelby Manuf'g & Imp. Co., 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116; McKinney v. Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640; Sennett

Same—On Rescission of Contract.

As we have seen, if a person has obtained money from another under an agreement which the latter has the right to rescind on the ground of fraud, duress, or undue influence, or on the ground of want or failure of consideration, or want of capacity to contract, or because of a breach of his contract by the other operating as a discharge, he may, on rescinding the contract, recover the amount paid as money received for his use.¹¹⁶ So, by the weight of authority, where a person, for like reasons, rescinds a contract which he has partly performed by the rendition of services, he may recover for the services on a promise created by law because of their receipt and the benefit conferred.¹¹⁷

The existence of the special contract in these cases which has been rescinded precludes the implication of any other contract in fact. The obligation, therefore, is necessarily imposed by law.

v. Shehan, 27 Minn. 328, 7 N. W. 266; Kriger v. Leppel, 42 Minn. 6, 43 N. W. 484; Sims v. Hutchins, 8 Smedes & M. (Miss.) 331, 47 Am. Dec. 90; Abbott v. Inskip, 29 Ohio St. 59; Shaw v. Shaw, 6 Vt. 69; Plummer v. Bucknam, 55 Me. 105; Clark v. Terry, 25 Conn. 395; HAWLEY v. MOODY, 24 Vt. 605; ante, p. 129. Contra, KING v. WELCOME, 5 Gray (Mass.) 41 (but see Riley v. Williams, 123 Mass. 506); Koch v. Williams, 82 Wis. 186, 52 N. W. 257.

¹¹⁶ Ante, p. 536.

¹¹⁷ Palanché v. Colburn, 8 Bing. 14; Ex parte Maclure, L. R. 5 Ch. App. 737; Seipel v. Insurance Co., 84 Pa. 47; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Medbury v. Watrous, 7 Hill (N. Y.) 110; WILLIAMS v. BEMIS, 108 Mass. 91, 11 Am. Rep. 318; Brown v. Railway Co., 36 Minn. 236, 31 N. W. 941; Shane v. Smith, 37 Kan. 55, 14 Pac. 477; ante, p. 549.

TABLE OF CASES CITED.

[THE FIGURES REFER TO PAGES.]

A

- Aaron v. Harley, 160.
 Abbott v. Creal, 183.
 v. Doane, 129.
 v. Hapgood, 504.
 v. Inskip, 553.
 v. Rose, 198, 483.
 v. Shepard, 26.
 Abell v. Munson, 65, 426.
 Abraham v. Railroad, 404.
 Abrams v. Railway Co., 319.
 Abshire v. Corey, 369, 441.
 Acheson v. Chase, 274.
 Ackert v. Barker, 296, 298.
 Ackley v. Parmenter, 69.
 Acme Electric, etc., Co. v. Van Der-
 beck, 269.
 Acme Mfg. Co. v. Reed, 24.
 Adair v. Winchester, 364.
 Adams v. Adams, 73, 304.
 v. Bank, 243, 245.
 v. Beall, 164, 165, 174.
 v. Coulliard, 329.
 v. Crosby, 550.
 v. Frye, 481, 483.
 v. Gay, 266, 269, 343.
 v. Jones, 24.
 v. Kuehn, 354.
 v. Leavens, 369.
 v. Lindsell, 25, 31.
 v. Messinger, 490.
 v. Nichols, 473.
 v. Otterback, 397, 398.
 v. Reeves, 543.
 v. Rodarmel, 369.
 v. Ryan, 54.
 v. Schiffer, 244.
 v. Shirk, 354.
 v. Stewart, 264.
 Adams County v. Hunter, 283.
 Adams Express Co. v. Reno, 338.
 v. Trego, 430.
 Adams Radiator & Boiler Works v.
 Schnader, 432.
 Addyston Pipe & Steel Co. v. U. S.,
 313.
 Adkins v. Watson, 87.
 Adler v. Railroad Co., 366.
 Adriance v. Rutherford, 429, 525.
 Aetna Ins. Co. v. Reed, 226.
 Aetna Iron & Steel Works v. Kossuth
 County, 431.
 Aetna Life Ins. Co. v. France, 215.
 v. Nexsen, 488.
 v. Sellers, 182.
 Aetna Nat. Bank v. Winchester, 479.
 Agnew v. Dumas, 103.
 Ahern v. Baker, 527.
 Aiken v. Blaisdell, 260-262, 265, 329,
 345.
 v. Nogle, 82.
 Aiman v. Stout, 180.
 Ainslie v. Martin, 146.
 v. Wilson, 536, 538.
 Aitkin v. Lang's Adm'r, 37.
 A. J. Anderson Electric Co. v. Light-
 ing Co., 426.
 Akin v. Peters, 436.
 Alabama G. S. R. Co. v. Railroad Co.,
 76.
 Alabama Mineral Land Co. v. Jackson,
 86.
 Alaska Packers' Ass'n v. Domenico,
 128.
 Albatross, Steamboat, v. Wayne, 396.
 Albert's Ex'rs v. Ziegler's Ex'rs, 419.
 Alcott v. Barber, 264.
 Alden v. Wright, 233.
 Alderson v. Langdale, 480, 483.

[The figures refer to pages.]

- Aldine Mfg. Co. v. Barnard, 549.
 Aldous v. Cornwell, 481.
 Aldrich v. Aldrich, 534.
 v. Ames, 70.
 v. Blackstone, 267.
 v. Funk, 166.
 v. Grimes, 168.
 v. Jackson, 469.
 v. Jewell, 68.
 v. Price, 426.
 v. Wilmarth, 514.
 Alexander v. Barker, 344.
 v. Brogley, 229.
 v. Gish, 359.
 v. Jones, 505.
 v. Pierce, 240-242.
 v. Swackhamer, 200.
 v. Vane, 534.
 Alfred Shrimpton & Sons v. Dworsky, 100.
 v. Philbrick, 229.
 Alger v. Scoville, 70.
 v. Thacher, 59, 306, 308.
 Alker v. Alker, 218.
 Allan v. Lake, 463.
 Allard v. Greasert, 103.
 v. Lamirande, 300.
 Allcord v. Skinner, 250.
 Allegre's Adm'rs v. Insurance Co., 219, 295.
 Allen v. Allen, 17, 58, 460.
 v. Baker, 476, 550.
 v. Bank, 399.
 v. Berryhill, 182, 185.
 v. Bryson, 138, 139.
 v. Chouteau, 29, 43.
 v. Compress Co., 428.
 v. Culver, 439.
 v. Deming, 269.
 v. Duffie, 118, 268.
 v. Ford, 549.
 v. Gardner, 267.
 v. Hammond, 201.
 v. Hart, 218, 224, 229.
 v. Hartfield, 222, 459.
 v. Hawks, 390.
 v. Jaquish, 424.
 v. Kennedy, 375.
 v. Kirwan, 42.
 v. Lardner, 155.
 v. Pearce, 323.
 v. Plasmeyere, 126.
 v. Rescous, 256, 257.
 v. Sowerby, 426.
 Allen v. Watson, 526.
 v. Withrow, 355.
 v. Woodward, 138.
 Aller v. Aller, 60.
 Allgeyer v. Louisiana, 260.
 Alliance Bank v. Broom, 123.
 Allin v. Shadburne's Ex'r, 5, 380, 381.
 Allis v. Billings, 182, 184, 185.
 v. McLean, 488.
 v. Voigt, 514.
 Allore v. Jewell, 251.
 Allred v. Bray, 503.
 Allshouse v. Ramsey, 97.
 Almond v. Hart, 72.
 Alston v. Boyd, 180.
 Alsworth v. Cordtz, 162.
 Alt v. Graff, 175.
 Alton v. Bank, 206.
 Alvarez v. Brannan, 230.
 Alves v. Hodgson, 345.
 Alvord v. Collin, 282.
 v. Smith, 38, 277.
 Alworth v. Seymour, 527.
 Ambler v. Phillips, 397.
 American Emigrant Co. v. Adams County, 451.
 American Bonding & Trust Co. v. Takahashi, 519.
 American Box Mach. Co. v. Crossman, 489.
 American Cotton Oil Co. v. Kirk, 119.
 American Exch. Nat. Bank v. Railroad Co., 356.
 American Gas & Oil Min. Co. v. Wood, 403.
 American Mortgage Co. v. Wright, 167, 169.
 American Pencil Co. v. Wolfe, 70.
 American Surety Co. v. Pauly, 406.
 Ames v. Booming Co., 510.
 v. Gilman, 264.
 v. Railroad Co., 350, 522.
 Amestoy v. Transit Co., 293.
 Amey v. Cockey, 166.
 Amis v. Kyle, 267.
 Ammerman v. Ross, 274.
 Ammondson v. Ryan, 273.
 Amory v. Gilman, 276, 277.
 Amoskeag Mfg. Co. v. U. S., 409.
 Amsden v. Atwood, 447.
 Anchor Electric Co. v. Hawkes, 309.
 Anderson v. Anderson, 241.
 v. Armstead, 201, 470.
 v. Baughman, 405.

[The figures refer to pages.]

- Anderson v. Brewing Co., 94.
 v. Farns, 327.
 v. Granite Co., 492.
 v. Harold, 89.
 v. Insurance Co., 219.
 v. Jett, 289.
 v. Martindale, 382, 384.
 v. May, 476.
 v. Reardon, 367.
 v. Smith, 151.
 v. Soward, 167.
 v. Spence, 70.
 v. Todd, 431.
 v. U. S., 314.
 v. Van Alen, 368.
 v. Walter, 390.
 v. Whitaker, 400.
- Anderson Electric Co. v. Lighting Co., 426.
- Anderson School Tp. v. Milroy Lodge, 65.
- Anding v. Levy, 346.
- Andre v. Bodman, 69, 72.
 v. Graebner, 420.
- Andrew v. Babcock, 88, 95.
- Andrews v. Ass'n, 337.
 v. Belfield, 432.
 v. Calloway, 482.
 v. Herriot, 343.
 v. Pond, 346.
 v. Smith, 478.
 v. Sullivan, 409.
- Androsoggin Water-Power Co. v. Metcalf, 549.
- Angier v. Webber, 309.
- Angle v. Insurance Co., 479.
 v. Railroad Co., 350.
- Anglo-California Bank v. Ames, 186.
- Angus v. Robinson, 382.
 v. Scully, 473.
- Anheuser-Busch Brewing Ass'n v. Hutmacher, 204.
 v. Mason, 330.
- Ann Berta Lodge v. Leverton, 95.
- Anon., 60, 78, 192.
- Anthony v. Machine Co., 194.
- Aplin v. Board, 145.
- Appleby v. Johnson, 28.
 v. Myers, 473.
- Applegarth v. Robertson, 235.
- Appleman v. Fisher, 280, 396.
- Appleton v. Bascom, 416.
- Appleton Bank v. McGilvray, 511, 543.
- Arbuckle v. Reaume, 343.
- Archer v. Bogue, 382.
 v. Freeman, 299.
 v. Helm, 74.
 v. Hudson, 248, 250.
- Archibald v. Thomas, 405.
- Arend v. Smith, 126.
- Argo v. Coffin, 179.
- Argus Co. v. Albany, 83.
- Arkansas M. R. Co. v. Whitley, 78.
- Arkansas Val. Smelting Co. v. Belden Min. Co., 360, 365.
- Arkwright v. Newbold, 232.
- Armfield v. Tate, 168, 330.
- Armitage v. Widoe, 154, 165, 504, 505.
- Armour v. Insurance Co., 214.
- Armstrong v. Bank, 331.
 v. Best, 345.
 v. Express Co., 319.
 v. Granite Co., 403, 404.
 v. Lewis, 238.
 v. McGhee, 41.
 v. Prentice, 127.
 v. Stokes, 517, 523.
 v. Toler, 331, 345.
- Arnheiter v. State, 268.
- Arnold v. Clifford, 259.
 v. Garst, 64.
 v. Iron Works, 182, 184, 185.
 v. Kreutzer, 307.
 v. Sprague, 520.
 v. Spurr, 501.
- Arnot v. Coal Co., 313, 329.
- Arthur v. Gordon, 36.
- Arundel v. Trevillian, 303.
- Ashbrook v. Dale, 328.
- Ashbury Carriage Co. v. Riche, 325.
- Ashcroft v. Butterworth, 105.
 v. Morrison, 105.
- Ashfield v. Ashfield, 168.
- Ashley v. Dixon, 350, 460.
 v. Henaban, 431.
 v. Henehan, 460.
- Ashmead v. Reynolds, 185.
- Ashton v. Thompson, 249, 250.
- Asiatic Banking Corp., Ex parte, 38, 370.
- Askey v. Williams, 156, 160.
- Askin v. Lebus, 272.
- Aspell v. Hosbein, 270.
- Astley v. Reynolds, 540.
- Atcheson v. Mallon, 258.
- Atchison v. Pease, 74.

[The figures refer to pages.]

Atchison R. Co. v. Dill, 244.
 v. Lawler, 319.
 Atchison, T. & S. F. R. Co. v. English,
 78.
 Atherford v. Beard, 276.
 Atkins v. Anderson, 494.
 v. Banwell, 140, 535.
 v. Johnson, 259.
 v. Owen, 537.
 Atkinson v. Allen, 244.
 v. Cox, 437.
 v. Dance, 495.
 v. Denby, 341.
 v. Truesdell, 397.
 Atkyns v. Kinnier, 310.
 Atlanta Min. Co. v. Gwyer, 273.
 Atlantic Cotton Mills v. Orchard Mills,
 541.
 Atlantic Phosphate Co. v. Ely, 343.
 Atlantic & P. Tel. Co. v. Barnes, 217.
 Atlas Bank v. Bank, 341.
 v. Brownell, 217.
 Atlas Nat. Bank v. Holm, 258.
 Atlee v. Backhouse, 243, 540.
 v. Bartholomew, 392.
 v. Fink, 302, 509.
 Attaway v. Bank, 302.
 Attrill v. Patterson, 430, 526.
 Atwater v. Hough, 100.
 v. Manville, 278, 337.
 Atwell v. Milton, 381.
 Atwood v. Cobb, 83, 86, 404, 405.
 v. Cornwall, 435.
 v. Emery, 405.
 v. Marshall, 55.
 v. Mt. Holly, 422.
 v. Norton, 81.
 Aubert v. Maze, 261.
 Audenreid's Appeal, 249.
 Audette v. L'Union St. Joseph, 460.
 Auditor v. Ballard, 40.
 Audrieu, Succession of, 141, 142.
 Audubon v. Insurance Co., 494.
 Augusta Ins. & Banking Co. v. Ab-
 bott, 214.
 Augusta Southern R. Co. v. Smith &
 Kilby Co., 426.
 Aulger v. Clay, 440.
 Aultman v. Waddle, 296.
 Aultman & Taylor Co. v. Trainer, 470.
 Austin v. Bacon, 273.
 v. Seligman, 356.
 v. Wacks, 409.
 Austrian v. Springer, 399.

Averill v. Hedge, 26, 31, 35.
 Avery v. Bowden, 444, 446.
 v. Dougherty, 519.
 v. Halsey, 327.
 v. Miller, 463.
 v. Willson, 212.
 v. Wilson, 453.
 Awalt v. Ass'n, 541.
 Ayer v. Hawkins, 437, 438.
 v. Kilner, 423.
 v. Mfg. Co., 394, 515.
 v. Telegraph Co., 204.
 Ayerst v. Jenkins, 300, 334.
 Aylesford v. Morris, 252.
 Ayres v. French, 222.
 v. Railroad Co., 128.

B

Babbitt v. Bennett, 54.
 Babcock v. Case, 237, 238.
 v. Hawkins, 492.
 v. Lawson, 238.
 v. Orbison, 509.
 Babcock & Wilcox Co. v. Moore, 430.
 Bach v. Smith, 265.
 v. Tuch, 236, 237.
 v. Tuck, 231.
 Bachelder v. Fiske, 381, 385
 Backus v. Fobes, 423.
 v. Spaulding, 369.
 Bacon v. Bonham, 252.
 v. Brown, 438.
 v. Cobb, 421.
 v. Eccles, 102.
 v. Lee, 261.
 v. Rupert, 521.
 v. Sondley, 521.
 Badeau v. U. S., 544.
 Badger v. Phinney, 171, 172, 178.
 v. Williams, 293.
 Badische, etc., v. Schott, 309.
 Baehr v. Wolf, 340.
 Baer v. Christian, 110.
 Bagley v. Peddie, 411.
 v. Rolling-Mill Co., 463, 467.
 Bailey v. Ass'n, 318.
 v. Austrian, 120.
 v. Barnberger, 174.
 v. Bensley, 399.
 v. Bussing, 535.
 v. Cornell, 517.
 v. Day, 129.
 v. Fox, 236.

[The figures refer to pages.]

- Bailey v. Mogg, 264, 346.
 v. Ogden, 84, 88.
 v. Railroad Co., 403.
 v. Richardson, 374.
 v. Walker, 110.
 Baily v. De Crespigny, 474, 475.
 Bain v. Brown, 510.
 Bainbridge v. Firmstone, 107, 113.
 v. Pickering, 157.
 Baird v. Laevison, 470.
 v. Mayor, 234.
 v. Millwood, 273.
 v. Sheehan, 290.
 v. U. S., 132.
 Baker v. Baker, 95.
 v. Burton, 264.
 v. Coddington, 80, 81.
 v. Denning, 89.
 v. Freeman, 500.
 v. Gregory, 190.
 v. Haskell, 55.
 v. Holt, 29.
 v. Humphrey, 217.
 v. Jewell, 382.
 v. Johnson, 474.
 v. Kennett, 164, 168.
 v. Lauterbach, 79, 91, 96.
 v. Lever, 238.
 v. Lovett, 152, 154.
 v. Maxwell, 237.
 v. Morton, 240, 241.
 v. Railroad Co., 117.
 v. Rockabrand, 223.
 v. Stackpole, 439.
 v. Stone, 178.
 v. Wainwright, 74.
 Balch v. Patten, 537.
 Baldey v. Parker, 99.
 Baldock v. Atwood, 65.
 Baldwin v. Barrows, 198.
 v. Bricker, 198.
 v. Dunton, 180.
 v. Emery, 358.
 v. Hiers, 67, 68.
 v. Hutchison, 241.
 v. Leonard, 521.
 v. Rosier, 162.
 v. Steamship Co., 540.
 v. Timber Co., 244.
 v. Walker, 374.
 v. Williams, 100.
 Baldy v. Stratton, 300.
 Balfour v. Davis, 271.
 Ball v. Dunsterville, 53, 500.
 v. Mannin, 179.
 Ballard v. Cheney, 409.
 v. Insurance Co., 483.
 Ballinger v. Bourland, 274.
 Ballou v. March, 135.
 v. Talbot, 517.
 Baltimore Baseball C. & E. Co. v. Pickett, 400.
 Baltimore Fire Ins. Co. v. McGowan, 425.
 Baltimore & O. R. Co. v. Brydon, 460.
 Baltimore & O. S. W. R. Co. v. Voight, 320.
 Baltimore & P. S. Co. v. Atkins, 517.
 Baltimore & S. R. Co. v. Faunce, 543.
 Balue v. Taylor, 58, 225, 237.
 Banchor v. Mansel, 329, 345, 346.
 Bancroft v. Dumas, 437.
 Bane v. Detrick, 240-242.
 Bane's Case, 123.
 Bangs v. Dunn, 284.
 v. Hornick, 279.
 Bankhead v. Alloway, 218.
 Bank of Australia v. Breillat, 324.
 Bank of British America v. Cooper, 393.
 Bank of Chillicothe v. Dodge, 207.
 Bank of Columbia v. Hagner, 28, 451.
 v. Patterson, 192.
 Bank of Commerce v. Bank, 481.
 v. Bogy, 367.
 Bank of Genesee v. Bank, 481.
 Bank of Ireland v. Evans Charities, 192.
 Bank of Limestone v. Penick, 481.
 Bank of Monroe v. Gifford, 435.
 Bank of New Hanover v. Bridgers, 122.
 Bank of New Orleans v. Matthews, 148.
 Bank of North America v. Wheeler, 493.
 Bank of U. S. v. Dandridge, 192.
 v. Daniel, 206, 226.
 v. Owens, 261, 262.
 Banks v. Everest, 514.
 v. Flint, 274.
 v. Werts, 269.
 Bannerman v. White, 213.
 Bannon v. Aultman, 393.
 Banorgee v. Hovey, 58, 478.
 Banton v. Shorey, 76.

[The figures refer to pages.]

- Bantz v. Bantz, 17.
 Barbee v. Barbee, 390.
 Barber v. Brown, 542.
 Barbour v. Barbour, 93, 304.
 Barclay v. Pearson, 280, 337, 338.
 Bardwell v. Purrington, 150.
 Barham v. Bell, 517.
 Barhite's Appeal, 17.
 Baring v. Peirce, 513.
 Barker v. Barker, 298, 300.
 v. Critzer, 119.
 v. Dinsmore, 200, 235.
 v. Hibbard, 156.
 v. Insurance Co., 519.
 Barkley v. Tarrant, 394.
 Barlow v. Lambert, 397.
 v. Robinson, 168.
 Barnaby v. Barnaby, 154.
 Barnard v. Campbell, 239.
 v. Coffin, 511.
 v. Iron Co., 236.
 v. Kellogg, 400.
 v. Lee, 409.
 v. Simons, 123.
 Barnes v. Barnes, 54, 155.
 v. Brown, 340, 486.
 v. Gidds, 493.
 v. Hedley, 137, 142.
 v. Insurance Co., 357, 422.
 v. Morrison, 259.
 v. Scott, 300.
 v. Shoemaker, 199.
 v. Smith, 279, 280, 343.
 v. Strong, 298.
 v. Toye, 157, 159.
 Barnett v. Smith, 436.
 Barnett v. Barnett, 180, 231, 393.
 v. College, 119, 450.
 v. Glutting, 514.
 v. Warren, 537.
 Barney v. Forbes, 389.
 v. Grover, 369.
 v. Newcomb, 406.
 Barons v. Brown, 204.
 Barr v. Gibson, 202.
 v. Kimball, 235.
 v. Schroeder, 527.
 Barrett v. Buxton, 186.
 v. Dodge, 346.
 v. Forney, 94.
 v. McAllister, 83, 97.
 Barrie v. Earle, 237.
 Barringer v. Ryder, 126.
 Barron v. Porter, 368.
 v. Tucker, 286.
 v. Vandvert, 129, 130.
 Barrows v. Cushway, 525.
 Barr's Adm'x v. Church, 274.
 Barry v. Capen, 287.
 v. Crosky, 231.
 v. Page, 517.
 v. Ransom, 392.
 Bartholomew v. Dighton, 154.
 v. Jackson, 18, 137, 138, 548.
 Bartle v. Coleman, 337.
 Bartlett v. Bailey, 174.
 v. Blanchard, 487.
 v. Collins, 342, 345, 346.
 v. Cowles, 172.
 v. Insurance Co., 71.
 v. Mystic River Corp., 78.
 v. Remington, 394.
 v. Robbins, 415.
 v. Telegraph Co., 320.
 v. Tucker, 517.
 v. Wyman, 127.
 Barton v. Benson, 258.
 Barwick v. Bank, 523.
 Basket v. Moss, 283.
 Bass v. Patterson, 272.
 Bassett v. Bassett, 448.
 v. Brown, 238.
 v. Camp, 103.
 v. Hughes, 356-358.
 Batavian Bank v. North, 240.
 Bate v. Payne, 535.
 Bateman v. Butler, 70.
 Bates v. Babcock, 75.
 v. Ball, 186.
 v. Childers, 45.
 v. Lumber Co., 365.
 v. Railroad Co., 53.
 v. Sandy, 125.
 v. Townley, 535.
 Batlzen v. Nicolay, 518.
 Batsford v. Every, 267.
 Batterman v. Pierce, 393.
 Battle v. McArthur, 132.
 Battles v. Fobes, 55.
 Baudouine v. Grimes, 526.
 Baugh v. Baugh, 494.
 Baughman v. Gould, 216.
 Baum v. Baum, 303.
 v. Du Bois, 500.
 Bausman v. Guarantee Co., 435.
 Bavington v. Clarke, 152.

[The figures refer to pages.]

- Baxter v. Aubrey, 494.
 v. Billings, 476.
 v. Burfield, 378.
 v. Camp, 354.
 v. Portsmouth, 181.
 Bay v. Williams, 356-358.
 Bayard v. McLane, 297.
 Bay City Bank v. Lindsay, 536.
 Bayler v. Com., 60.
 Bayley v. Homan, 491.
 v. Taber, 335.
 Baylies v. Pettyplace, 475.
 Baylis v. Dinely, 153.
 Bayne v. U. S., 541.
 v. Wiggins, 88.
 Bayview Brewing Co. v. Techlenberg, 470.
 Beach v. Church, 37.
 v. Hotchkiss, 382.
 v. Mullin, 430.
 Beadles v. Bless, 276.
 v. McElrath, 279, 390.
 Beal v. Chase, 309.
 v. Polhemus, 287.
 Beals v. See, 183.
 Beaman v. Buck, 95.
 Beaman's Adm'r v. Russel, 70.
 Bean v. Atwater, 452.
 v. Burbank, 35, 119.
 v. Clark, 42.
 v. Mining Co., 519.
 v. Proseus, 471.
 v. Simpson, 368.
 Bearce v. Barstow, 274.
 Beard v. Beard, 544.
 v. Bliley, 224, 234.
 v. Campbell, 223.
 v. Horton, 534.
 Beardsley v. Hotchkiss, 161, 162.
 v. Knight, 52, 208.
 v. Morgner, 366.
 Beasley v. Beasley, 185.
 Beattie v. Hilliard, 389.
 Beatty v. Lumber Co., 456.
 Beatty's Estate v. College, 119.
 Beauchamp v. Winn, 401.
 Beaumont v. Brengeri, 101, 103.
 v. Greathead, 486.
 v. Reeve, 109, 301, 334.
 Beaupre v. Telegraph Co., 42.
 Beaver v. Fulp, 130.
 Bechtel v. Cone, 94, 466.
 Beck v. Haas, 437, 438.
 Becker v. Boon, 440.
 v. Mason, 177.
 v. Waterworks, 352.
 Beckham v. Drake, 517.
 Beckwith v. Butler, 180.
 v. Cheever, 22.
 v. Frisbie, 244.
 v. Talbot, 88.
 Beck & Pauli Lithographing Co. v. Elevator Co., 410.
 Beddoo's Ex'r v. Wadsworth, 375.
 Bedier v. Reaume, 237.
 Bedinger v. Whittamore, 92.
 Beebe v. Johnson, 135, 472.
 Beecham v. Smith, 384.
 Beecher v. Buckingham, 378.
 v. Conradt, 452.
 Beekman v. Fletcher, 86.
 Beeler v. Young, 156, 158-160.
 Beer v. Aultman-Taylor Co., 389.
 Beeston v. Caller, 430.
 Begbie v. Sewage Co., 257, 337.
 Behaly v. Hatch, 441.
 Behl v. Schuett, 242.
 Behn v. Burness, 210, 464-466.
 Behrensmeyer v. Kreitz, 147.
 Beidman v. Goodell, 503.
 Beller v. Devall, 81.
 Beitenman's Appeal, 268.
 Beith v. Beith, 247.
 Belden v. Hann, 481.
 Belding v. Smythe, 340.
 Belding Bros. & Co. v. Frankland, 222.
 Belfast & M. L. R. Co. v. Unity, 21.
 Belknap v. Bank, 480.
 v. Bender, 69.
 Bell v. Bank, 55.
 v. Bruen, 403.
 v. Campbell, 340.
 v. Cunningham, 509.
 v. Dagg, 469.
 v. Eaton, 223.
 v. Ellis, 222.
 v. Gardiner, 543.
 v. Hewitt's Ex'rs, 78.
 v. Hoffman, 464.
 v. Keepers, 236, 237.
 v. McConnell, 302.
 v. Mahin, 269, 484.
 v. Teague, 520.
 Bellas v. Hays, 409.
 Beller v. Block, 515.
 Belleville Sav. Bank v. Bornman, 436.

[The figures refer to pages.]

- Belleville Sav. Bank v. Winslow, 380.
 Bellows v. Sowles, 66, 125.
 Bell's Adm'r v. Huggins' Adm'rs, 471.
 Bell's Gap R. Co. v. Christy, 504.
 Belote v. Henderson, 246.
 Belz v. Keller, 225.
 Beman v. Wessels, 269.
 Bender v. Been, 129.
 v. Sampson, 130.
 Bendernagle v. Cocks, 493.
 Benecke v. Haebler, 445.
 Benedict v. Bachelder, 270.
 v. Cowden, 480.
 v. Miner, 480, 481.
 Benesch v. Weil, 235, 239.
 Benge v. Hiatt's Adm'r, 355.
 Benicia Agricultural Works v. Estes, 390.
 Beninger v. Corwin, 224.
 Benjamin v. Benjamin, 501, 513.
 v. Dockham, 499.
 Bennehan v. Webb, 406.
 Benneson v. Aiken, 54.
 Bennett v. Ass'n, 346.
 v. Brumfitt, 89.
 v. Davis, 154.
 v. Ford, 244.
 v. Hibbert, 147.
 v. Hill, 492.
 v. Hull, 98.
 v. Judson, 229.
 v. Morse, 134.
 v. Pierce, 470.
 Bennitt v. The Guiding Star, 511.
 Benoit v. Inhabitants, 525.
 Bensley v. Bignold, 261, 265.
 Benson v. Markoe, 207.
 v. Monroe, 541.
 v. Shotwell, 426.
 Bent v. Cobb, 90.
 v. Manning, 159.
 Bentall v. Burn, 103.
 Bentinck v. Franklin, 297.
 Bentley v. Robson, 242.
 Benton v. Ass'n, 32.
 v. Holland, 496.
 v. Pratt, 231, 350.
 Benyon v. Cook, 252.
 Berdell v. Bissell, 132.
 Bergen v. Frisbie, 286.
 Bergenthal v. Fiebrantz, 543.
 Bergin v. Williams, 389.
 Bergson v. Insurance Co., 365.
 Berkeley v. Hardy, 521.
 Berkmeier v. Kellerman, 248.
 Berkshire Woolen Co. v. Proctor, 398.
 Bernard v. Taylor, 276, 339.
 Bernhardt v. Walls, 100.
 Bernshouse v. Abbott, 522.
 Berry v. Bacon, 58.
 v. Bakeman, 223.
 v. Brown, 520.
 v. Carter, 295.
 v. Doremus, 80.
 v. Hall, 116.
 v. Nall, 440.
 v. Whitney, 226.
 Bersch v. Insurance Co., 277.
 Bertrand v. Byrd, 52.
 Besant v. Wood, 304.
 Besse v. Dyer, 38.
 Best v. Davis, 96.
 v. Strong, 298.
 Bestor v. Hickey, 167.
 v. Hickie, 244.
 v. Wathen, 288.
 Bethlehem v. Annis, 360, 364.
 Bethlehem Borough v. Fire Co., 549.
 Betterbee v. Davis, 441.
 Bettini v. Gye, 458, 465.
 Beveridge v. Rawson, 503.
 Beverley's Case, 179, 185.
 Bevier v. Covell, 274.
 Bevin v. Insurance Co., 277.
 Beymer v. Bonsall, 522.
 Bibb v. Allen, 65, 84, 118, 279, 280, 342, 508.
 Bice v. Building Co., 72.
 Bickel v. Sheets, 330.
 Bickford v. Bank, 519.
 v. Cooper, 405.
 Bicknell v. Waterman, 436.
 Bicknell v. Bicknell, 158.
 Bidault v. Wales, 222.
 Biddel v. Brizzolara, 496.
 Bierne v. Ray, 116.
 Biest v. Shoe Co., 78.
 Bigelow v. Bigelow, 112.
 v. Burnham, 346.
 v. Denison, 505.
 v. Grannis, 167.
 v. Kinney, 153, 166, 171, 172.
 v. Stilphen, 482.
 Bigger v. Bovard, 463.
 Biggers v. Owen, 39.
 Biggs v. Barry, 222.
 Bignall v. Gould, 412.
 Bilbie v. Lumley, 544.

[The figures refer to pages.]

- Bill v. Bament, 82.
 v. Porter, 436, 478.
 Billings v. Morrow, 505.
 Billings' Appeal, 477.
 Billingsley v. Harris, 57.
 Billington v. Cahill, 82.
 Billiot v. Robinson, 441.
 Billmeyer v. Wagner, 487.
 Binford v. Bruso, 229.
 Bingham v. Bingham, 201, 207.
 v. Madison, 204.
 Birchell v. Neaster, 96.
 Bird v. Church, 460.
 v. Munroe, 82, 91, 105.
 v. Randall, 380.
 v. Swain, 167.
 Birdsall v. Clark, 511.
 v. Russell, 480.
 Birkbeck v. Kelly, 94.
 Birkett v. Chatterton, 264.
 Birkhauser v. Schmitt, 206, 207, 544.
 Birkmyr v. Darnell, 68.
 Birks v. French, 266.
 Birmingham Warehouse, etc., Co. v.
 Land Co., 225.
 Bisbee v. McAllen, 261, 263.
 Bishop v. Eaton, 24.
 v. Holcomb, 367.
 v. Palmer, 136, 308, 323, 334.
 v. Small, 227.
 Bissell v. Heyward, 441.
 v. Spring Valley Tp., 192.
 Bixby v. Dunlap, 350.
 v. Moor, 17, 322, 323.
 Bize v. Dickason, 542.
 Black v. Black, 233.
 v. Cord, 60.
 v. De Camp, 422.
 v. Foljambre, 247.
 v. Walker, 470.
 v. Woodrow, 477.
 Blackburn v. Hayes, 271.
 v. Mann, 72.
 v. Mason, 400.
 v. Reilly, 455.
 v. Smith, 545.
 Blackett v. Assurance Co., 400.
 Blackie v. Clark, 249.
 Blackman v. Dowling, 471.
 Blacknall v. Parish, 500.
 v. Rowland, 228.
 Blackstone v. Buttermore, 526, 527.
 Blackwell v. Hamilton, 52.
 v. Willard, 147.
 Blades v. Free, 37, 528.
 Blagborne v. Hunger, 419, 426.
 Blagen v. Thompson, 487.
 Blaine v. Publishers George Knapp
 & Co., 433.
 Blaisdell v. Ahern, 299.
 Blake v. Cole, 78.
 v. Coleman, 389.
 v. Elizabeth, 149.
 v. Insurance Co., 27.
 v. Peck, 121.
 v. Stump, 399.
 v. Voight, 78.
 Blakely v. Sousa, 257, 476.
 v. Susa, 378.
 Blakeney v. Goode, 101.
 Blakstone v. Buttermore, 527.
 Blalock v. Phillips, 435, 519.
 Blanchard v. Russell, 344.
 v. Trim, 426.
 Blanding v. Sargent, 80.
 Blank v. Dreher, 68.
 v. Nohl, 304.
 Blaskower v. Steel, 496.
 Blatchford v. Preston, 282.
 Blattenberger v. Holman, 469.
 Bleaden v. Charles, 535.
 Bledsoe v. Irvin, 380.
 Blewitt v. Boorum, 56, 392.
 Bliss v. Lawrence, 284, 285.
 v. Perryman, 141.
 v. Railroad Co., 179.
 Bliven v. Lydecker, 274.
 v. Screw Co., 398.
 Blood v. Enos, 419.
 v. Goodrich, 426, 506.
 v. Wilson, 431.
 Bloom v. Hazzard, 284.
 v. Richards, 266.
 Bloomer v. Bernstein, 456.
 v. Henderson, 370.
 v. Nolan, 158, 169.
 Bloss v. Bloomer, 257.
 Blossom v. Railroad Co., 22.
 Blount v. Harvey, 376.
 Bloxam v. Sanders, 459.
 Bloxsome v. Williams, 326.
 Bluestone Coal Co. v. Bell, 201.
 Blymer v. Bonsall, 522.
 Blythe v. Railroad Co., 429.
 Boardman v. Cutter, 100.
 v. Hayne, 369.
 v. Spooner, 89, 400.
 v. Taylor, 273, 274.

[The figures refer to pages.]

- Boardman v. Thompson, 298.
 Board of Com'rs of Bartholomew County v. Jameson, 298.
 Board of Com'rs of Delaware County v. Lock Co., 365.
 Board of Education v. Board, 145.
 Board of Education v. Greenbaum, 192.
 Board of Education v. Townsend, 474.
 Boast v. Firth, 476, 550.
 Bobbitt v. Insurance Co., 214.
 Bobe's Heirs v. Stickney, 437, 439, 440.
 Bock v. Perkins, 405.
 Boccock v. Pavey, 511.
 Bodine v. Insurance Co., 511.
 Bofinger v. Tuyes, 392.
 Boggs v. Curtin, 415.
 v. Wann, 112.
 Bogie v. Bogie, 53.
 Bohanan v. Pope, 356.
 Bohart v. Oberne, 514.
 Bohn Mfg. Co. v. Hollis, 314, 315.
 Boit v. Maybin, 23.
 Boland v. O'Neil, 303.
 Bolles v. Carli, 349.
 v. Sachs, 390, 448.
 Bollin v. Hooper, 270.
 Bollman v. Burt, 455.
 Bolton v. Lambert, 29.
 Bomar v. Rosser, 233.
 Bommer v. Mfg. Co., 504.
 Bond v. Bond, 180.
 Bonelli v. Blakemore, 76.
 Bonnewell v. Jenkins, 39.
 Bonney v. Morrill, 394.
 Bonsfield v. Wilson, 337.
 Bontelle v. Melendy, 270.
 Bonwell v. Howes, 302.
 Boody v. McKenney, 168, 172, 173.
 Book v. Mining Co., 96.
 Bool v. Mix, 150, 154, 164, 165, 170.
 Boone, In re, 302.
 v. Chiles, 300.
 v. Eyre, 457.
 Booske v. Ice Co., 45.
 Booth v. Bank, 262.
 v. Mill Co., 473, 487.
 v. Powers, 480, 483.
 v. Tyson, 453.
 Boothbay v. Giles, 52.
 Boothby v. Scales, 464.
 Boothe v. Fitzpatrick, 138, 139.
 Boozer v. Teague, 94.
 Borchsenius v. Canutson, 71.
 Borden v. Railroad Co., 205.
 Bordentown Tp. v. Wallace, 151.
 Borland v. Guffy, 28.
 Bosden v. Sir John Thenne, 138.
 Bosley v. Shanner, 241.
 Bostick v. Blades, 303.
 v. McClaren, 293.
 Boston v. Farr, 68.
 Boston Ice Co. v. Potter, 199, 349, 549.
 Boston Rubber Co. v. Wringer Co., 492.
 Boston Safe-Deposit & Trust Co. v. Water Co., 352.
 Boston & M. R. R. Co. v. Bartlett, 31, 35.
 Boston & S. Glass Co. v. Boston, 244.
 Bostwick v. Bryant, 367.
 v. Insurance Co., 197, 236.
 v. Leach, 76.
 Bothwell v. Brown, 294.
 Bouchell v. Clary, 156, 160.
 Boucher v. Lawson, 345.
 Boulder Valley D. M. & M. Co. v. Farnham, 93.
 Boulton v. Jones, 199.
 Bour v. Kimball, 429.
 Bourlier v. Macauley, 350.
 Bourne v. Mason, 352.
 Boutelle v. Smith, 307.
 Bowdell v. Parsons, 448.
 Bowditch v. Insurance Co., 260, 341.
 Bowdoin v. Hammond, 271.
 Bowdoin College v. Merrett, 247.
 Bowe v. Bowe, 249.
 v. U. S., 145.
 Bowen v. Hall, 350, 512.
 v. Railroad Co., 422.
 v. Tipton, 22, 123.
 Bower v. Blessing, 21.
 v. Fenn, 230.
 v. Stone Co., 366, 367.
 Bowerman v. Rogers, 509.
 Bowers v. Thomas, 198.
 Bowery Nat. Bank v. Wilson, 284.
 Bowes v. Shand, 410, 462, 464.
 Bowker v. Hoyt, 453.
 v. Lowell, 242.
 Bowling v. Blum, 292.
 v. Taylor, 316.
 Bowman v. Coffroth, 286.
 v. Neely, 273.
 v. Patrick, 116, 236.

[The figures refer to pages.]

- Bowman v. Taylor, 58.
 Bowser v. Bliss, 309, 310.
 v. Patrick, 406.
 Boyce v. Tabb, 346.
 Boyce's Adm'r v. Smith, 180.
 Boyd v. De La Montagnie, 249.
 v. Dobson, 506.
 v. Eaton, 324.
 v. Gunnison, 408.
 v. Hanson, 342.
 v. Hind, 133.
 v. Hitchcock, 131.
 v. Lee, 149.
 v. State, 146.
 Boydell v. Drummond, 88.
 Boyden v. Boyden, 161, 168, 175.
 Boyer v. Berryman, 182, 183.
 v. Bolender, 534.
 Boyett v. Potter, 537.
 Boylan v. Railroad Co., 20.
 Boyle v. Adams, 290.
 Boylston v. Bain, 274.
 Boynton v. Ball, 493.
 v. Hubbard, 252.
 v. Moulton, 496.
 v. Page, 266, 267.
 v. Veazie, 103.
 Boyson v. Thorn, 350.
 Bozeman v. Browning, 151.
 Brackett v. Blake, 284, 365.
 v. Griswold, 232.
 v. Mountfort, 481.
 v. People, 494.
 Bradburne v. Botfield, 384.
 Bradbury v. Place, 182.
 Bradford v. Chicago, 244.
 v. Foster, 33.
 v. Greenway, 190.
 v. Roulston, 139.
 v. Williams, 466.
 Bradlaugh v. Newdegate, 297.
 Bradley v. Ballard, 194.
 v. Irish, 245.
 v. King, 455.
 v. Owsley, 94.
 v. Pratt, 160.
 v. Rea, 270, 398, 469.
 v. Richardson, 516.
 Bradner v. Roffsell, 460.
 Bradshaw v. Bradbury, 402.
 v. Davis, 492.
 v. Van Winkle, 177.
 Bradstreet v. Baker, 519.
 Brady v. Evans, 233.
 v. Finn, 228.
 v. Horvath, 337.
 Bragg v. Danielson, 419.
 v. Wetzel, 380.
 Braitch v. Guelick, 323.
 Brakefield v. Anderson, 91, 96.
 Braley v. Kelly, 89.
 v. Powers, 230.
 Braman v. Bingham, 56.
 Brandon v. Brown, 173.
 Brands v. De Witt, 74.
 Brandt v. Railroad Co., 441.
 v. Turner, 464.
 Branson v. Kitchenman, 110.
 Brant v. Johnson, 69.
 Brantley v. Wolf, 178.
 Brauer v. Shaw, 26, 27, 34.
 Braun v. Keally, 264, 343.
 Brawley v. U. S., 120.
 Brawner v. Franklin, 172.
 Bray v. Kettell, 517.
 Brayshaw v. Eaton, 159.
 Brazee v. Bryant, 266.
 Bream v. Dickerson, 374.
 Breckenridge v. Lewis, 514.
 Breckenridge's Heirs v. Ormsby, 163, 182.
 Breckinridge v. Crocker, 86.
 Bredin's Appeal, 323.
 Breed v. Judd, 156, 157.
 Breen v. Moran, 396, 469.
 Breese v. Telegraph Co., 320.
 Breitling v. Marx, 53.
 Brengle v. Bushey, 59.
 Brennan v. Chapin, 19.
 v. Clark, 412.
 Brent v. Cook, 398.
 v. Green, 515.
 Bresee v. Stanly, 167.
 Bressey's Adm'r v. Gross, 179.
 Bret v. J. S. & Wife, 108.
 Bretto v. Levine, 393.
 Brewer v. Horst & Lackmund Co., 88.
 v. Marshall, 375, 376.
 v. Maurerer, 357.
 v. Sparrow, 539.
 Brewster v. Banta, 270.
 v. Edgerly, 413.
 v. Hatch, 216.
 v. Leith, 103.
 Breyfogle v. Walsh, 237.
 Breyman v. Railroad Co., 407.

[The figures refer to pages.]

- Brice v. Bannister, 368.
v. King, 356.
- Brick Presbyterian Church v. City of New York, 474.
- Bridges v. Stickney, 487.
- Briggs v. Boyd, 540.
v. Latham, 110.
v. McCabe, 153.
v. Sizer, 15, 28.
v. Tillotson, 117.
v. U. S., 96.
- Brigham v. Carlisle, 488.
v. Fayerweather, 183.
v. Herrick, 394.
v. Palmer, 389, 507.
- Brill v. Rack, 237.
v. Tuttle, 368.
- Brinker v. Scheunemann, 343.
- Brinkley v. Swicegood, 485.
- Brinton v. Van Cott, 93.
- Brisbane v. Dacres, 541, 544.
- Briscoe v. Reynolds, 480, 483.
- Bristol v. Braidwood, 229.
- Bristol Aerated Bread Co. v. Maggs, 28.
- Bristol Sav. Bank v. Stiger, 391.
- Bristow v. Lane, 356.
v. Sequeville, 345.
- British Columbia & Vancouver's Island Spar, Lumber & Saw-Mill Co. v. Nettleship, 487.
- British Wagon Co. v. Lea, 360, 364.
- British & Am. Tel. Co. v. Colson, 26, 27.
- Britt v. Hays, 485.
- Brittain v. Aingier, 87.
v. Daniels, 58.
v. Lloyd, 137.
v. Rossiter, 92.
- Britton v. Dierker, 480.
v. Phillips, 30.
v. Turner, 462.
- Broadwater v. Darne, 186.
- Broadwell v. Getman, 80.
- Brockway v. Allen, 520.
v. Express Co., 344.
v. Frost, 86.
v. Harrington, 116.
v. Mullin, 513.
- Brogden v. Marriott, 276.
v. Railroad Co., 22, 23, 25.
- Bronson v. Herbert, 21.
- Bronson Agricultural & B. Ass'n v. Ramsdell, 277.
- Brooke v. Filer, 147.
v. Logan, 305.
- Brooker v. Scott, 155.
- Brooklyn Bank v. De Grauw, 442.
- Brooks v. Avery, 272.
v. Ball, 112, 115.
v. Berryhill, 245.
v. Hamilton, 216, 218.
v. Martin, 217, 337.
v. Stuart, 381.
v. Wage, 121.
v. White, 131.
v. Wichita, 413.
- Brosnan v. McKee, 75.
- Brothers v. Bank, 179.
- Broumel v. Rayner, 454.
- Brower v. Callender, 240.
v. Fisher, 179.
v. Goodyer, 222.
- Brown v. Adams, 111.
v. Bank, 89, 122, 273, 274, 293.
v. Benight, 381.
v. Bennett, 141.
v. Bigne, 297.
v. Brown, 54-56, 180, 274, 283, 285, 303.
v. Browning, 266, 343.
v. Burbank, 248, 249.
v. Burns, 437.
v. Byrne, 397.
v. Caldwell, 154.
v. Combs, 516.
v. Duncan, 261.
v. Dysinger, 441.
v. Everett-Ridley-Ryan Co., 341.
v. Everhard, 420, 426.
v. Farnham, 133.
v. Finance Co., 343.
v. Foster, 400, 432.
v. Fowler, 87.
v. Gardner, 272.
v. Hoag, 94.
v. Hodgson, 535.
v. Johnson, 513.
v. Jordhal, 53.
v. Kinsey, 301.
v. Latham, 108.
v. Leach, 228.
v. Levy, 205.
v. Lumber Co., 419, 420.
v. McCreight, 294.
v. McCune, 177.
v. McKee, 383.
v. Markland, 395.

[The figures refer to pages.]

- Brown v. Miles, 182.
 v. Miller, 528.
 v. Neaily, 257.
 v. Norman, 236, 237.
 v. Odill, 304, 448.
 v. Peck, 246.
 v. Pinkham, 481.
 v. Pitcairn, 236.
 v. Pollard, 92, 93.
 v. Railway Co., 29, 553.
 v. Reiman, 522.
 v. Rice, 21.
 v. Road Co., 543.
 v. Safe-Deposit Co., 409, 410.
 v. Savings Union, 33.
 v. Speyers, 289.
 v. Stillman, 357.
 v. Sutton, 94.
 v. Telegraph Co., 320.
 v. Trust Co., 65.
 v. Tuttle, 549.
 v. Vandyke, 273.
 v. Weldon, 470.
 v. Wheeler, 218.
 v. Wheelock, 152.
 v. Wiggin, 516.
 Brown Chemical Co. v. Atkinson, 396.
 Brownell v. Harsh, 121.
 v. Winnie, 481.
 Browning v. Berry, 83.
 v. Crouse, 492.
 v. Insurance Co., 215.
 v. Morris, 341.
 v. Parker, 91.
 Brownlee v. Lowe, 129.
 Brown University v. College, 145.
 Brown & Haywood Co. v. Wunder.
 100.
 Brua's Appeal, 278.
 Bruce v. Bishop, 21, 29, 41.
 v. Lumber Co., 393.
 v. Pearson, 29.
 Bruecher v. Port Chester, 244.
 Bruen v. Marquard, 382.
 Brumby v. Smith, 473.
 Brummitt v. McGuire, 543.
 Brun v. Brun, 303.
 Brundage v. Port Chester, 537.
 Brunnell v. Sawmill Co., 399.
 Brush v. Sweet, 299.
 Brunswick-Balke-Collender Co. v.
 Boutell, 520.
 Bryan v. Brazil, 130.
 v. Foy, 130.
 Bryan v. Reynolds, 285, 286.
 v. Wash, 54.
 v. Watson, 268.
 Bryant v. Booze, 26, 268.
 v. Insurance Co., 219.
 v. Isburgh, 464.
 v. Moore, 513, 514.
 v. Peck, 243, 245.
 v. Pember, 469.
 v. Richardson, 157.
 Bryson v. Haley, 330.
 Buchanan v. Bank, 343.
 v. Hubbard, 168, 171.
 v. Insurance Co., 276, 277.
 v. Moran, 72.
 v. Tilden, 355, 357.
 Buck v. Bank, 292.
 v. Biddeford, 268.
 v. Burk, 404.
 v. Coward, 309.
 Buckey v. Buckey, 179.
 Buckingham v. Ludlum, 117, 118.
 Buckley v. Beardslee, 87.
 v. Humason, 264.
 Buckner v. Anderson, 74.
 v. Smith, 369.
 Budd v. Hiler, 538.
 v. Rutherford, 293.
 Buel v. Miller, 426.
 Buell v. Chapin, 435.
 Buffalo v. O'Malley, 543.
 Buffalo Barbwire Co. v. Phillips, 487.
 Buffalo E. S. R. Co. v. Railroad Co.,
 474.
 Buffendeau v. Brooks, 333, 390.
 Buffington v. Gerrish, 239.
 Buford v. Tucker, 398.
 Bugbee v. Kendricksen, 68.
 Bughman v. Bank, 222.
 Buhl v. Stephens, 97.
 Building & Loan Ass'n of Dakota v.
 Logan, 346.
 Bulkley v. Devine, 395.
 v. Fishing Co., 193.
 v. Landon, 137.
 Bull v. Bull, 494.
 v. Hopkins, 494.
 v. Rice, 271, 272.
 Bullion & Exch. Bank v. Otto, 96.
 Bullitt v. Farrar, 230.
 Bullock v. Adams' Ex'rs, 409.
 v. Lumber Co., 402.
 v. Sprowls, 174.
 v. Tschergi, 103.

[The figures refer to pages.]

- Bullock v. Turnpike Co., 77.
 Bulow v. Goddard, 540.
 Bundy v. Newton, 297.
 Bunge v. Koop, 444.
 Bunker v. Hodgson, 474.
 Bunn v. Guy, 311.
 v. Riker, 276.
 v. Winthrop, 301.
 Bunneman v. Wagner, 71.
 Burbridge v. Fackler, 285, 287.
 Burch v. Breckenridge, 190, 191.
 Burchfield v. Moore, 469, 479, 545.
 Burck v. Taylor, 365.
 Burden Bank v. Phelps, 291.
 Burdett v. Williams, 167, 177.
 Burger v. Rice, 360.
 v. Roelsch, 265.
 Burges v. Wickham, 395.
 Burgess v. Carpenter, 350.
 v. Pollock, 180.
 Burgess Sulphite Fibre Co. v. Broom-
 field, 120.
 Burghart v. Angerstein, 156, 157.
 v. Hall, 157.
 Burke v. Adams, 54.
 v. Allen, 185.
 v. Miller, 389.
 v. Railway Co., 20, 505.
 v. Taylor, 116, 249.
 Burkett v. Moses, 364.
 Burkhardt v. School Tp., 475.
 Burkholder v. Casad, 54.
 Burkle v. Levy, 236.
 Burks v. Albert, 438.
 Burlen v. Shannon, 50.
 Burley v. Russell, 177.
 Burlingame v. Brewster, 480.
 Burlington Lumber Co. v. Lumber
 Co., 197.
 Burn v. Carvalho, 367.
 Burnard v. Haggis, 177.
 Burnes v. Allen, 58.
 v. Scott, 300, 392.
 Burnet v. Bisco, 110, 111, 119.
 Burnett v. Burnett, 54.
 v. Crandall, 366.
 v. McCluey, 53.
 v. Telegraph Co., 268.
 Burney's Heirs v. Ludeling, 288.
 Burnham v. Kidwell, 179, 182, 183.
 v. Mitchell, 180.
 Burns v. Dockray, 235.
 v. Lane, 229.
 v. Mahannah, 227.
 Burns v. Moore, 266, 267.
 v. Real-Estate Co., 65, 426.
 v. Smith, 154.
 Burns & Smith Lumber Co. v. Doyle,
 392, 393.
 Burr v. Beers, 357.
 v. Sickles, 435.
 v. Willson, 233.
 Burrell v. Highleyman, 99.
 Burrell's Case, 225.
 Burrill v. Stevens, 222.
 Burritt v. Insurance Co., 214, 215.
 Burroughs v. Guano Co., 229.
 Burrows v. Ward, 19.
 v. Wene, 236.
 Burt v. Meyer, 278.
 v. Place, 338.
 v. Quisenberry, 252.
 Burtis v. Thompson, 444, 445.
 Burton v. Driggs, 538, 540.
 v. Henry, 383.
 v. Larkin, 356.
 v. Leroy, 53.
 v. Marshall, 188.
 v. Shotwell, 32.
 Burwell v. Burgwyn, 50.
 Busby v. Bush, 395.
 Busch v. Wilcox, 223.
 Buschman v. Codd, 224, 230, 232.
 Bush v. Breinig, 186.
 v. Brown, 246.
 v. Holmes, 102.
 v. Linthicum, 162, 165.
 v. Merriman, 401.
 v. Rawlins, 126.
 Bushnell v. Bushnell, 534.
 Bussing v. Rice, 239.
 Buswell v. Bicknell, 428.
 Butcher v. Krauth, 510.
 Butler v. Barnes, 375.
 v. Breck, 151.
 v. Burleson, 311.
 v. Dinan, 92.
 v. Duncan, 252.
 v. Eschelman, 223.
 v. Lee, 268.
 v. Maples, 513.
 v. Miller, 479.
 v. Price, 497.
 v. Wigge, 406.
 Butler's Appeal, 221.
 Butler & Baker's Case, 32, 55.
 Butterfield v. Byron, 473.
 v. Hartshorn, 423.

[The figures refer to pages.]

Butters v. Haughwout, 239.
Buxton v. Lester, 490.
Byers v. Chapin, 463.
Byrd v. Bertrand, 422.
 v. Hughes, 301.
Byrne v. Cummings, 107, 471.
 v. Tienhoven, 34.
Byrnes v. Claffey, 437.
Byxbie v. Wood, 365.

C

Cable v. Foley, 244.
 v. Insurance Co., 215.
Cabot v. Christie, 229, 230.
 v. Kent, 410.
Cadman v. Markle, 95.
Cadwallader v. West, 179, 249, 250.
Cagney v. Cuson, 225.
Cabill v. Bigelow, 68.
Cain v. Heard, 500.
 v. McGuire, 76.
 v. Warford, 179.
Cairnes v. Bleecker, 505.
Caldwell v. Layton, 404.
 v. Myers, 468.
 v. School Dist., 44.
 v. Walters, 188.
 v. Wentworth, 437.
Calhoun v. Atchison, etc., 26.
 v. Millard, 504.
 v. Phillips, 266.
California Nat. Bank v. Kennedy, 193.
Calkins v. Chandler, 121-123.
Callahan v. Stanley, 397.
Callan v. McDaniel, 373.
Callanan v. Chapin, 91.
 v. Edwards, 369.
Calland v. Loyd, 541.
Callis v. Day, 153, 168, 171.
Callisher v. Bischoffsheim, 122, 125.
Callo v. Brouncker, 430.
Camden Iron Works v. Fox, 410.
Cameron v. Durkheim, 289.
Caminada v. Hulton, 280.
Cammerer v. Muller, 304.
Camp v. Camp, 74.
 v. Telegraph Co., 320.
Campanari v. Woodburn, 37.
Campbell v. Clay, 423.
 v. Com'rs, 364.
 v. Floyd, 423.
 v. Hillman, 524.
 v. Holt, 496.

Campbell v. Insurance Co., 215.
 v. Jones, 56, 458.
 v. Kuhn, 185.
 v. Moran Bros. Co., 459.
 v. Perkins, 176.
 v. Potter, 489.
 v. Richardson, 276.
 v. Segars, 264.
 v. Stakes, 176, 177.
 v. Thomas, 56.
 v. Van Houten, 197.
 v. Young, 269.
Campbell Printing Press Co. v. Thorp, 433.
Campbell's Estate, In re, 419.
Canadian Pac. R. Co. v. Telegraph Co., 289.
Canajoharie Bank v. Diefendorf, 335.
Canal Com'rs v. People, 406.
Candee v. Telegraph Co., 320.
Canedy v. Marcy, 207.
Cannam v. Farmer, 189.
Cannan v. Bryce, 330.
Cannon v. Alsbury, 154.
 v. Handley, 91.
 v. Lindsey, 197.
 v. Ryan, 266.
Canon v. Grigsby, 483.
Canterberry v. Miller, 404.
Canton Co. v. Railroad Co., 29.
Canty v. Latterner, 366.
Capehart v. Carradine, 223.
 v. Rankin, 289.
Capen v. Barrows, 416.
 v. Insurance Co., 526.
Caperton's Adm'r v. Caperton, 404.
Card v. Hope, 282.
Cardell v. McNiel, 71.
Cardwell v. McClelland, 224.
Carew v. Rutherford, 317, 540.
Carey v. Hess, 141, 142.
 v. Mackey, 303.
 v. Woods, 324.
Carlill v. Smoke-Ball Co., 23, 39.
Carlisle v. Campbell, 69, 90.
Carlton v. Hulett, 237.
 v. Railroad Co., 130.
Carman v. Pultz, 441.
Carmichael v. Buck, 515.
Carnahan v. Bailey, 222.
Carnegie v. Holt, 487.
 v. Morrison, 355.
Carney v. Carney, 94.
Carnig v. Carr, 79.

[The figures refer to pages.]

- Carolina Interstate Building & Loan Ass'n v. Black, 177.
 Carpenter v. Carpenter, 164, 180.
 v. Cornings, 73.
 v. Galloway, 426.
 v. Medford, 45.
 v. Rodgers, 186.
 v. Wright, 228.
 Carr v. Clough, 164, 172.
 v. Duval, 30, 31, 36.
 v. McCarthy, 78.
 Carrell v. Potter, 162, 167.
 Carrier v. Sears, 182, 185.
 Carri v. Snyder, 310.
 Carrol v. Blencow, 189.
 Carroll v. People, 236.
 v. Tyler, 284.
 Carroll Co. Sav. Bank v. Strother, 272.
 Carson v. Cochran, 57, 544.
 v. Lucas, 40.
 Carter v. Alling, 309.
 v. Carter, 384.
 v. Coal Co., 399.
 v. Harden, 231.
 v. Insurance Co., 364.
 v. Nichols, 366.
 v. Phillips, 409, 462.
 v. Scargill, 466.
 v. Strom, 414.
 v. West, 249.
 Carthrae v. Brown, 383.
 Cartwright v. Cartwright, 303.
 Carver v. Jackson, 57.
 Case v. Ayers, 229.
 v. Fant, 437.
 v. Seass, 436.
 v. Seger, 75.
 Case Mfg. Co. v. Soxman, 435.
 Casey v. Casey, 217, 248.
 v. Miller, 423.
 Cason v. Cheely, 98.
 Caspari v. Church, 250.
 Cass County Bank v. Bricker, 294.
 Casserleigh v. Wood, 112, 298.
 Cassidy v. McKenzie, 528.
 Cassidy, Succession of, 375.
 Castle v. Kemp, 236.
 Castner v. Richardson, 90.
 Catawissa R. Co. v. Titus, 383.
 Cates v. Bales, 113.
 Catlett v. Trustees, 268.
 Catlin v. Tobias, 453, 456.
 Catling v. King, 84.
 Caton v. Caton, 72, 89, 94.
 v. Stewart, 287.
 Catts v. Phalen, 539.
 Caulkins v. Hellman, 101, 102.
 Cavanaugh v. Jackson, 74.
 Cavendish v. Greaves, 369.
 Caylor v. Roe, 72, 95.
 Cayzer v. Taylor, 399.
 Oecil v. Spurger, 224.
 Central Lith. & E. Co. v. Moore, 100.
 Central Ohio Salt Co. v. Guthrie, 313.
 Central R. Co. v. Anderson, 400.
 Central Shade Roller Co. v. Cushman, 315.
 Central Transp. Co. v. Pullman's Palace-Car Co., 193, 288.
 Central Trust Co. v. Bank, 372.
 Central Trust Co. v. Burton, 343.
 Central Trust Co. v. Mfg. Co., 469.
 Cesar v. Karutz, 224.
 Chace v. Chapin, 354.
 Chadsey v. Condley, 33.
 v. Guion, 407.
 Chadwick v. Knox, 286, 287.
 Chaffee v. Thomas, 137, 138.
 Chalfant v. Payton, 303.
 Challenge Wind & Feed Mill Co. v. Kerr, 32.
 Chamberlain v. Beller, 508.
 v. Grimes, 300.
 v. Railroad Co., 295.
 v. Williamson, 378.
 Chamberlin v. Fuller, 228.
 v. Gilman, 367.
 Chambers v. Baldwin, 350.
 v. Ker, 162.
 v. Lancaster, 366.
 v. Seay, 525-527.
 Chambliss v. Matthews, 369.
 Champenois v. Fort, 437.
 Champlin v. Parrish, 89.
 v. Rowley, 453, 551.
 Chancely v. Bailey, 333.
 Chandler v. Johnson, 293, 323.
 v. Marsh, 471.
 v. Sanger, 244, 540.
 v. Simmons, 163, 173.
 Chanter v. Hopkins, 462, 465.
 v. Leese, 382, 383.
 Chapin v. Brown, 306.
 v. Chapin, 442.
 v. Dobson, 394.
 v. Longworth, 360, 364.

[The figures refer to pages.]

- Chapin v. Shafer, 164, 170.
 Chaplin v. Rogers, 102.
 Chapman v. Brooklyn, 471.
 v. Dease, 16.
 v. Hughes, 158.
 v. J. W. Beltz & Sons Co., 444.
 v. Persinger, 57.
 v. Rose, 198.
 v. Sutton, 537.
 Chappel v. Brockway, 308.
 v. Spencer, 482.
 Chapple v. Cooper, 156, 158, 548.
 Charles v. Hastedt, 178.
 v. Scott, 59.
 Charles Green's Son v. Salas, 146.
 Charley v. Potthoff, 466.
 Charlton v. Reed, 480.
 Charnley v. Winstanley, 528.
 Chase v. Day, 68.
 v. Fitz, 72, 378.
 v. Henry, 382.
 Chase Nat. Bank v. Faurot, 271.
 Chase's Ex'rs v. Burkholder, 324.
 Chastain v. Bowman, 497.
 Chateau v. Singla, 328.
 Chateaugay Ore & Iron Co. v. Blake, 398, 399.
 Chatham Furnace Co. v. Moffatt, 230.
 Cheddick's Ex'r v. Marsh, 412.
 Cheek v. Bellows, 190.
 Cheesman v. Wiggins, 70.
 Cheltenham Stone & Gravel Co. v. Iron Works, 435.
 Chemical Co. v. Pegram, 385.
 Chemical Electric Light & Power Co. v. Howard, 469.
 Chenault v. Bush, 470.
 Cheney v. Cook, 35.
 v. Duke, 330.
 v. Eastern Transp. Line, 29.
 v. Libby, 409.
 Cherbonnier v. Evitts, 250.
 Chesapeake & O. Canal Co. v. Hill, 403.
 v. Ray, 425.
 Chesapeake & P. Tel. Co. v. Telegraph Co., 289.
 Chesebrough v. Conover, 286.
 Cheshire v. Barrett, 168.
 Chesterfield v. Jansen, 251.
 Cheveront v. Textor, 133, 258.
 Chicago v. Tilley, 449.
 Chicago Attachment Co. v. Sewing Mach. Co., 74, 92.
 Chicago Bldg. & Mfg. Co. v. Barry, 446.
 v. Graham, 416.
 Chicago, B. & Q. R. Co. v. Aurora, 406.
 Chicago Dock Co. v. Kinzie, 91, 96.
 Chicago Gaslight & Coke Co. v. Coke Co., 288.
 Chicago, M. & St. P. Ry. v. Clark, 130, 132.
 Chicago, S. F. & C. R. Co. v. Price, 460.
 Chicago, St. P., M. & O. Ry. v. Belliwith, 197.
 Chicago & G. E. R. Co. v. Dane, 31, 33, 119.
 Chick v. Trevett, 113.
 Chicora Fertilizer Co. v. Dunan, 131.
 Childers v. Bank, 407.
 Childs v. Merrill, 225, 237.
 Chilton v. People, 525.
 Chipley v. Atkinson, 350.
 Chippewa V. R. Co. v. Railroad Co., 285.
 Chowne v. Baylis, 539.
 Chrisman v. Hodges, 420.
 v. Miller, 462.
 Christian College v. Hendley, 118.
 Christie v. Bridgman, 141.
 v. Craige, 492.
 Christy v. Sullivan, 207, 544.
 Chrysler v. Canaday, 224, 227.
 Chubbuck v. Cleveland, 231.
 Chung Kee v. Davidson, 356.
 Church v. Fowle, 482.
 v. Gas Co., 192.
 v. Proctor, 332.
 Churchill v. Bradley, 114.
 v. Holt, 535.
 v. Scott, 251.
 v. Suter, 272.
 Chute v. Quincy, 236.
 Chytraus v. Smith, 26.
 Cicotte v. Church of St. Anne, 41.
 Citizens' Bank v. Grafflin, 542.
 Citizens' Building Ass'n v. Cummings, 53.
 Citizens' Fire Ins. Security & Land Co. v. Doll, 407.
 Citizens' Nat. Bank v. Richmond, 479.
 v. Smith, 199.
 Citizens' Sav. Bank & Trust Co. v. Babbitts' Estate, 123.
 City v. Mfg. Co., 97.

[The figures refer to pages.]

- City Nat. Bank v. Kusworm, 245, 252.
 City of Aurora v. West, 335.
 City of Baltimore v. Hughes, 534.
 City of Chicago v. Weir, 407.
 City of Cincinnati v. Coke Co., 407.
 City of Elgin v. Joslyn, 397.
 City of Elizabeth v. Fitzgerald, 433.
 v. Force, 480.
 City of Garden City v. Heller, 404.
 City of Memphis v. Bethel, 272.
 City of Minneapolis v. Reum, 146.
 City of New Britain v. Telephone, 412.
 City of New Orleans v. Railroad Co., 451.
 City of Newport News v. Potter, 359.
 City of Ottawa v. First Nat. Bank, 57.
 Claflin v. Boorum, 271, 272.
 v. Godfrey, 471, 545.
 v. Lenheim, 526.
 v. Meyer, 343.
 v. Torlina, 333.
 Clanton v. Scruggs, 76.
 Clapp v. Banking Co., 393.
 Clara A. McIntyre, The, 300
 Clark v. Bank, 509.
 v. Bowen, 494.
 v. Clark, 94.
 v. Coffin Co., 395.
 v. Collier, 461.
 v. Crosby, 307.
 v. Fisk, 357.
 v. Fosdick, 303.
 v. Gilbert, 550.
 v. Goddard, 153.
 v. Herring, 108.
 v. Insurance Co., 215.
 v. Jones, 68, 70, 71, 123.
 v. Kirkpatrick, 179.
 v. Lovering, 524.
 v. Mallory, 392, 404.
 v. Marsiglia, 446.
 v. Martin, 376.
 v. Moody, 508.
 v. Moore, 453, 487.
 v. Needham, 308.
 v. Parish, 381.
 v. Pease, 246.
 v. Pendleton, 72, 78, 81.
 v. Pinney, 537.
 v. Railroad Co., 382.
 v. Ralls, 228.
 v. Russell, 123.
 v. Steel Works, 455.
 v. Sylvester, 542.
 Clark v. Tate, 170.
 v. Terry, 553.
 v. Thayer, 239.
 v. Turnbull, 242, 243.
 v. Van Court, 167.
 v. Weiss, 459.
 v. Woodruff, 407.
 Clarke v. Brown, 338.
 v. Dickson, 235.
 v. Dutcher, 544.
 v. Foss, 280.
 v. Lumber Co., 341.
 v. McAuliffe, 75.
 v. Morey, 148.
 v. Railroad Co., 429.
 v. White, 257.
 Clark's Case, 490.
 Clason v. Bailey, 88, 89.
 Clawson v. Doe, 170.
 Clay v. Field, 395.
 v. Ricketts, 36.
 v. Yates, 259, 332.
 Clayton v. Clark, 130.
 v. Kynaston, 381.
 v. Merrett, 528.
 Clayton's Case, 438, 439.
 Clealand v. Walker, 503, 523.
 Cleary v. Sohier, 473.
 Cleaveland v. Richardson, 221.
 Cleaver v. Lenhart, 306.
 Clem v. Railroad Co., 226.
 Clement v. Brown, 488.
 v. Gunhouse, 52.
 Clements v. Railroad Co., 412.
 Clement's Appeal, 70, 257.
 Clement & Hawkes Mfg. Co. v. Meser-
 ole, 447.
 Clendining v. Church, 276, 277.
 Clerihew v. Bank, 393.
 Cleveland v. Williams, 528.
 Cleveland Rolling Mill v. Rhodes, 410,
 455, 464.
 Clews v. Jamieson, 278.
 Clifford v. Watts, 134, 135.
 Clifton v. Iron Co., 478.
 Clinch Valley Coal & Iron Co. v. Wil-
 ling, 393.
 Cline v. Guthrie, 198.
 v. Templeton, 125.
 Clinton Nat. Bank v. Studemann, 70.
 Clodfelter v. Cox, 370.
 Cloud v. Greasley, 88.
 Clough v. Giles, 423.
 v. Railroad Co., 235, 236.

[The figures refer to pages.]

- Clute v. Robison, 369.
 Clutter v. Clutter, 248.
 Coad v. Rogers, 28.
 Coapstick v. Bosworth, 393.
 Coates v. Sangston, 393.
 v. Wilson, 156.
 Cobb v. Billings, 265.
 v. Charter, 540.
 v. Cowdery, 109, 113, 128, 323.
 v. Duke, 189.
 v. Foree, 26, 34.
 v. Hatfield, 235-237.
 v. Knapp, 522, 523.
 v. Malone, 492.
 v. Wright, 233.
 Cobett v. Norcross, 55.
 Cobleigh v. Pierce, 257.
 Coburn v. Goodall, 373.
 v. Webb, 481, 482.
 Cocanougher v. Green, 495.
 Cochran v. Nebeker, 480.
 v. Railway Co., 412.
 v. Stewart, 238.
 v. Ward, 93, 97.
 v. Willis, 201.
 Cochrane v. Halsey, 221.
 Cockle v. Flack, 273.
 Cocks v. Barker, 56.
 v. Simmons, 152.
 v. Varney, 358.
 Coddington v. Goddard, 83, 89, 221.
 Coe v. Hinkley, 367.
 v. Hobby, 393.
 v. Tough, 84.
 Cofer v. Moore, 116.
 Coffin v. Landis, 430.
 v. McIntosh, 75.
 v. Talman, 374.
 Cogel v. Kniseley, 222, 224.
 Cogg's v. Bernard, 111.
 Cogley v. Cushman, 165, 171.
 Cohen v. Envelope Co., 315.
 v. Insurance Co., 148.
 Coit v. Telegraph Co., 320.
 Colbert v. Shepherd, 510.
 Colby v. Dearborn, 389.
 Cold Blast Transp. Co. v. Bolt & Nut Co., 120.
 Colderwood v. McCrea, 342.
 Cole v. Cassidy, 229.
 v. Cole, 179.
 v. Edwards, 311.
 v. Hughes, 375.
 v. Milmine, 280.
 Cole v. O'Brien, 518.
 v. Pennoyer, 151, 153, 154.
 v. Seeley, 151.
 v. Singerly, 77, 78.
 v. Smith, 227.
 Coleman v. Applegarth, 33, 34.
 v. Bank, 522.
 v. Billings, 298.
 v. Eyre, 99, 117.
 v. Frazer, 179.
 v. Whitney, 356, 357.
 Coleman's Estate, In re, 247.
 Coles v. Kennedy, 222.
 v. Railroad Co., 320.
 v. Trecothick, 115.
 v. Vanneman, 236.
 Colgate v. Pennsylvania Co., 399.
 Collamer v. Day, 276.
 Collar v. Patterson, 17, 549.
 College Mill Co. v. Fidler, 27, 42.
 Collen v. Wright, 518.
 Collier v. Coates, 92, 552.
 v. White, 441.
 Collins v. Blantern, 59, 293.
 v. Collins, 483.
 v. Insurance Co., 520.
 v. Lavelle, 403.
 v. Locke, 296, 317.
 v. Rainey, 510.
 v. Tillou's Adm'r, 508.
 v. Westbury, 244.
 Collyer v. Collyer, 41.
 v. Moulton, 419, 423, 446.
 Colton v. Gorham, 374.
 Columbia Bank v. Hagner, 459, 461.
 Columbian Bldg. Ass'n v. Crump, 440.
 Columbus Const. Co. v. Crane Co., 403.
 Colusa County v. Welch, 285.
 Colwell v. Lawrence, 413.
 Colyer v. Hyden, 54.
 Combination Steel & Iron Co. v. Railway Co., 435.
 Combs v. Hawes, 172.
 v. McQuinn, 299.
 v. Scott, 490, 505, 506.
 Comer v. Baldwin, 55.
 Comit's v. Parkerson, 146.
 Comley v. Dazian, 357.
 Commercial Bank v. Norton, 511, 512.
 v. Warren, 483.
 Commercial Fire Ins. Co. v. Allen, 441, 442.
 Commercial Nat. Bank v. Smith, 87.
 v. Wheelock, 246.

[The figures refer to pages.]

- Commercial Tel. Co. v. Smith, 29, 42, 43.
 Commercial Union Assur. Co. v. Hocking, 295.
 Com. v. Dupuy, 297.
 v. Eastman, 222.
 v. Gillespie, 267.
 v. Hunt, 317.
 v. Insurance Co., 215.
 v. Lane, 344.
 v. Matthews, 268.
 v. Moltz, 218.
 v. Murray, 151.
 v. Rees, 267.
 v. Richards, 303.
 Commonwealth Title Ins. & Trust Co. v. Ellis, 407.
 Compton v. Bank, 243, 245.
 v. Jones, 363.
 Comstock v. Adams, 304.
 v. Hier, 537.
 v. Sanger, 467.
 v. Smith, 138.
 v. Ward, 81.
 Conant v. Bank, 392.
 v. Canal Co., 505.
 v. Jackson, 179.
 Conaway v. Sweeny, 115.
 Condict v. Flower, 482.
 Condit v. Baldwin, 505.
 Condon v. Kemper, 412, 413.
 Conduitt v. Ross, 375.
 Cone v. Cross, 17.
 Conflans Quarry Co. v. Parker, 484.
 Conger v. Railroad Co., 490.
 Conkey v. Bond, 510.
 Conlan v. Roemer, 236.
 Conley v. Nailor, 187, 301.
 v. Sims, 264.
 Conn v. Coburn, 158, 160.
 Connecticut Ins. Co. v. Luchs, 219.
 Connecticut Mut. Life Ins. Co. v. Westertoff, 272.
 Connelly v. Devoe, 128.
 Conner v. Henderson, 238.
 Connolly v. Giddings, 80.
 Connor v. Black, 342.
 v. Renneker, 33.
 v. Stanley, 249.
 Conover v. Stillwell, 126.
 Conrad v. Gibbon, 272.
 v. Lane, 177.
 v. Schwamb, 115.
 v. Trustees of Grand Grove, 441.
 Conroe v. Birdsall, 177.
 Conrow v. Little, 237.
 Constable v. Steamship Co., 320.
 Constant v. University, 122.
 Consumer's Oil Co. v. Nunnemaker, 309, 325.
 Contine v. Phillips, 158.
 Converse v. Blumrich, 218.
 Conway v. Post Co., 290.
 Cooch v. Goodman, 52, 59.
 Cook v. Bradley, 109, 111.
 v. Brown, 53, 55.
 v. Ferral's Adm'rs, 459.
 v. Forker, 269.
 v. Johnson, 310, 311.
 v. McCabe, 473.
 v. Mix, 471.
 v. Redman, 81.
 v. Shipman, 285.
 v. Tullis, 503.
 v. Wright, 122, 125.
 Cooke v. Davis, 289.
 v. Millard, 100, 101.
 v. Murphy, 128.
 v. Oxley, 33, 35, 110.
 Cookingham v. Dusa, 237.
 Cooley v. Osborne, 298.
 v. Willard, 513.
 Coolidge v. Brigham, 235.
 v. Ruggles, 362.
 Coombs v. Wilkes, 84, 88.
 Coon v. Anderson, 380.
 v. Spaulding, 408.
 Cooper v. Berry, 398.
 v. Bill, 103.
 v. Cooper, 17, 539, 549.
 v. Finke, 390.
 v. Kane, 396.
 v. Lovering, 227.
 v. Phibbs, 201, 206.
 v. Schlesinger, 229.
 v. Schwartz, 505.
 v. Wheel Co., 120.
 Cope v. Rowlands, 260-262, 264.
 Coplay Iron Co. v. Pope, 467.
 Coquillard's Adm'r v. Bearss, 285.
 Corbett v. Spencer, 170.
 Corbin v. Laswell, 52.
 Corbitt v. Gaslight Co., 89.
 Corby v. Weddle, 198.
 Corcoran v. White, 28.
 Cordes v. Miller, 474.
 Cordwert v. Hunt, 424.
 Cornell v. Green, 441.

[The figures refer to pages.]

- Cornig v. Carr, 45.
 Corning v. Abbott, 261.
 Cornish v. Suydam, 421.
 v. West, 416.
 Cornish, Curtis & Greene Co. v. Ass'n,
 431.
 Cornwell v. Megins, 423.
 Cornwells v. Kregel, 36.
 Corpe v. Overton, 176.
 Corrigan v. Pironi, 249.
 Corser v. Hale, 28.
 Cort v. Lassard, 490.
 v. Railway Co., 447.
 Cory v. Freeholders, 538, 540.
 v. Ship Bldg. Co., 487.
 Cosand v. Bunker, 96.
 Cossitt v. Hobbs, 86.
 Costar v. Davies, 435.
 Costello v. Cady, 491.
 Coster v. Albany, 358.
 Costigan v. Lunt, 383.
 v. Railroad Co., 375.
 Coston v. Morris, 15.
 Cote v. Murphy, 318.
 Cotheal v. Talmage, 413.
 Cothran v. Ellis, 276.
 v. Scanlan, 442.
 Cottage St. M. E. Church v. Kendall,
 118.
 Cotten v. McKenzie, 323.
 Cottom v. Holliday, 510.
 Cotton v. Graham, 108.
 Cottrell v. Southwick, 274, 275.
 Cottrill v. Krum, 228.
 Cotzhausen v. Simon, 229.
 Couch v. Ingersol, 451.
 v. Meeker, 56.
 v. Mills, 381.
 Couder v. Hall, 200.
 Coudert v. Sayre, 375.
 Coughlin v. Knowles, 91.
 v. Railroad Co., 297, 298.
 Coulkins v. Fry, 186.
 Coulter v. Robertson, 333.
 Coulurier v. Hastie, 516.
 Counselman v. Reichart, 278.
 Countess of Dunmore v. Alexander,
 31.
 County of Des Moines v. Hinkley, 366.
 Coursolle v. Weyerhauser, 154.
 Courtney v. Blackwell, 250.
 Courtright v. Burnes, 300.
 Couturier v. Hastie, 71, 201.
 Covell v. Turner, 41.
 Coventry v. Barton, 508.
 Coverdale v. Eastwood, 218.
 Cowan v. Milbourn, 332.
 v. Musgrave, 17.
 Cowee v. Cornell, 247.
 Cowles v. Bacon, 218.
 v. Whitman, 489.
 Cowles Electric Smelting & Aluminum
 Co. v. Lowrey, 404, 406.
 Cowley v. Smyth, 218.
 Cox v. Brewing Co., 82.
 v. Brookshire, 273.
 v. Davis, 389.
 v. Highley, 230.
 v. Long, 463.
 v. Montgomery, 236.
 v. Prentice, 545.
 v. Smith, 273, 289.
 Coykendall v. Constable, 505.
 Coyle v. Campbell, 264.
 Coyne v. Avery, 410.
 Coyner v. Lynde, 128.
 Cozart v. Herndon, 23.
 v. Land Co., 96.
 Crabill v. Marsh, 93.
 Crabtree v. May, 162.
 v. Messersmith, 444, 448.
 v. Opera House Co., 28.
 Craddock v. Dwight, 435.
 Craft v. Kendrick, 72.
 v. McConoughy, 313, 337.
 Crafts v. Carr, 156.
 Cragin v. Railroad Co., 429.
 Craig v. Hamilton, 232.
 v. Seitz, 141, 142.
 v. Van Bebber, 169, 170, 173.
 Craighead v. Peterson, 506.
 v. Wells, 172.
 Cram v. Hendricks, 271.
 Cramer v. Redman, 117.
 Crandall v. Payne, 356.
 Crane v. C. Crane & Co., 120.
 v. Gough, 72, 91, 367.
 v. Gruenewald, 502.
 v. Powell, 96.
 v. Wheeler, 67.
 Crans v. Hunter, 125.
 Cranson v. Goss, 269.
 Crawford v. Bank, 480.
 v. Cato, 244.
 v. Edison, 72.
 v. King, 71.
 v. Millspaugh, 419.
 v. Morrell, 322.

[The figures refer to pages.]

- Crawford v. Publishing Co., 428.
 v. Russell, 303.
 v. Spencer, 278, 335.
 Crawshaw v. Roxbury, 40.
 Crayton v. Clark, 369.
 Cream City Glass Co. v. Friedlander, 394.
 Crears v. Hunter, 122.
 Crehore v. Crehore, 232.
 Cremer v. Higginson, 438.
 Cresinger v. Welch's Lessee, 170.
 Cresswell Ranch & Cattle Co. v. Martindale, 455.
 Cribbins v. Markwood, 252.
 Cribbs v. Sowle, 241.
 Crichfield v. Paving Co., 337.
 Cripps v. Reade, 545.
 Crisfield v. State, 534.
 Crist v. Armour, 448.
 Crisup v. Grosslight, 292.
 Critcher v. Holloway, 331.
 Critchfield v. Paving Co., 285, 287.
 Crittenden v. Fiske, 24.
 Crocker v. Railroad Co., 31, 34.
 v. Whitney, 363.
 Crockett v. Scribner, 100.
 Crompton v. Pratt, 439.
 Cromwell v. Grunsden, 52.
 v. Sac Co., 493.
 v. Tate's Ex'r, 53.
 v. Wilkinson, 410.
 Cronin v. Watkins, 374.
 Croninger v. Crocker, 442.
 Cronk v. Trumble, 93.
 Crook v. Cowan, 15.
 Crooks v. Nippolt, 236.
 Cropp v. Hambleton, 441.
 Crosby v. Fitch, 429.
 v. Wadsworth, 76.
 Cross v. Cheshire, 535.
 v. O'Donnell, 101, 103.
 v. People, 281.
 Crossley v. Maycock, 28, 43.
 v. Moore, 333, 341.
 Crouch v. Credit Foncier, 369.
 Croucher v. Oakman, 486.
 Crowder v. Keys, 68.
 Crowe v. Peters, 179.
 Crowell v. Hopkinton, 38.
 v. Hospital, 358.
 v. Jackson, 221.
 Crowfoot v. Gurney, 367.
 Crowther v. Farrer, 122.
 Crowther v. Rowlandson, 180.
 Croyle v. Moses, 222.
 Crum v. Sawyer, 112.
 Cuddee v. Rutter, 489.
 Culbreath v. Culbreath, 537.
 Cullen v. Butler, 405.
 Culp v. Love, 308.
 Culver v. Banning, 110, 118.
 v. Bigelow, 272.
 Cumber v. Wane, 129.
 Cumming v. Hackley, 536.
 Cummings v. Arnold, 65, 426.
 v. Gann, 38, 39.
 v. Henry, 186.
 v. Lake Realty Co., 30.
 v. Stone Co., 315.
 Cummins v. Cassily, 500.
 v. Heald, 511.
 Cundell v. Dawson, 261.
 Cundy v. Lindsay, 199, 239.
 Cunningham v. Bank, 279, 335, 342.
 v. Reardon, 548.
 v. Williams, 83, 89.
 Curliffe v. Harrison, 442.
 Curran v. Galen, 317.
 Currie v. Misa, 107.
 Curry v. Curry, 17.
 v. Insurance Co., 214.
 v. Railway Co., 416.
 Curson v. Monteiro, 58.
 Curtin v. Patton, 167.
 Curtis v. Aspinwall, 258.
 v. Blair, 501.
 v. Brown, 71.
 v. Brownell, 180.
 v. Clark, 470.
 v. Leavitt, 340.
 v. Sage, 80, 81.
 v. Van Bergh, 412.
 Curtiss v. Howell, 226, 237.
 Cusack v. Robinson, 101.
 Cushing v. Drew, 412.
 v. Wyman, 439.
 Cutler v. Dickinson, 57.
 v. Hamlen, 224.
 v. Howe, 399.
 v. Welsh, 331.
 Cutsinger v. Ballard, 94.
 Cutter v. Cochrane, 419, 420.
 v. Powell, 457, 477, 551.
 Cutting v. Railway Co., 486, 487.
 Cutts v. Guild, 202, 207.
 Cuxon v. Chadley, 363, 422.

[The figures refer to pages.]

D

Dade Coal Co. v. Haslett, 148.
 Dady v. Condit, 233.
 Dailey v. Cain, 78.
 v. Green, 463, 469.
 v. Kinsler, 96.
 Dails v. Lloyd, 542.
 Daily v. Litchfield, 414.
 v. Minnick, 107, 139.
 Dakin v. Pomeroy, 371.
 v. Williams, 451, 461.
 Dale v. Kimpton, 368.
 v. Knepp, 268.
 v. Robinson, 191.
 Daley v. Investment Co., 273, 274.
 Dallas v. Hollingsworth, 170, 175.
 Dalpay, In re, 345.
 Dalton v. Goddard, 516.
 v. Thurston, 222.
 Daly v. Smith, 490.
 Dambmann v. Lorentz, 35, 45.
 v. Schulting, 221.
 Dame v. Flint, 343.
 Damon v. Osborn, 102.
 Dana v. Coombs, 168.
 v. Fielder, 397.
 v. Hancock, 426.
 Danby v. Coutts, 525.
 Danforth v. Freeman, 432.
 v. Railroad Co., 488.
 Daniel v. Swearengen, 350.
 v. Tarver, 471.
 Daniels v. Barney, 337.
 v. Brodie, 507.
 v. Meinhard, 366.
 v. Newton, 447.
 Dannat v. Fuller, 409.
 Danolds v. State, 145.
 Dant v. Head, 80.
 Darby v. Kroell, 233.
 D'Arcy v. Lyle, 508.
 Darling v. Stanwood, 511.
 Darlington Iron Co. v. Foote, 26.
 Darlington's Appeal, 250.
 Darraugh v. Blackford, 168.
 Darrow v. Produce Co., 394.
 v. St. George, 526, 527.
 Darst v. Bates, 71.
 v. Brockway, 471.
 Darwin v. Rippey, 481.
 Dashaway Ass'n v. Rogers, 538, 540.
 Dashiell v. Harshman, 233.

Dauchey v. Drake, 431.
 Dausch v. Crane, 240.
 Davenport v. Newton, 28.
 v. Ottawa, 280.
 v. Society, 129.
 Davidson v. Bohlman, 264.
 v. Burke, 419.
 v. Carter, 340.
 v. Cooper, 480, 482.
 v. Little, 252.
 v. Nichols, 232.
 v. Young, 178.
 Davie v. Mining Co., 44, 119.
 Davies v. Burns, 284.
 v. Davis, 226.
 v. Humphreys, 534.
 v. Lowen, 324.
 v. Stowell, 298.
 Davis v. Arledge, 257.
 v. Bank, 528.
 v. Bauer, 484.
 v. Belford, 383, 416.
 v. Bronson, 329, 344-446.
 v. Burton, 53.
 v. Caldwell, 157, 159.
 v. Chase, 298.
 v. Com., 286.
 v. Davis, 226.
 v. England, 519, 520.
 v. Foreman, 490.
 v. Gallagher, 18.
 v. Gay, 160.
 v. Hamlin, 510.
 v. Henry, 480, 481.
 v. Higgins, 389.
 v. Jeffris, 451.
 v. Lane, 504, 528, 529.
 v. McFarlane, 76.
 v. McVickers, 471.
 v. Morton, 493.
 v. Parish, 36.
 v. Patrick, 71.
 v. Phillips, 179.
 v. Railroad Co., 20, 194, 320.
 v. Robert, 120.
 v. Sanderlin, 384.
 v. Settle, 300.
 v. Shafer, 416.
 v. Shields, 89.
 v. Sloman, 273.
 v. Smith, 245, 293.
 v. Tibbats, 327.
 v. Van Buren, 381.

[The figures refer to pages.]

- Davis v. Webber, 298.
 v. Williams, 54.
 v. Wills, 24.
 Davison v. Von Lingen, 210, 464.
 Davis Sewing Mach. Co. v. Richards, 24.
 Davisson v. Ford, 124, 125.
 Davis & Rankin Bldg. & Mfg. Co. v.
 Barber, 416.
 v. Booth, 416.
 Dawe v. Morris, 225, 226.
 Dawes v. Prentice, 405.
 Dawkins v. Gill, 292.
 v. Sappington, 40.
 Dawson v. Ewing, 441.
 v. Godfrey, 146.
 v. Hall, 55, 56.
 v. Helmes, 170, 173.
 v. Kittle, 398.
 Day v. Buggy Co., 194.
 v. Caton, 15.
 v. Davis, 59.
 v. Gardner, 107, 131.
 v. Griffith, 55.
 v. Lacasse, 91.
 v. Leal, 58, 479.
 v. McAllister, 269.
 v. McLea, 492.
 v. Railroad Co., 79.
 Dayton v. Fargo, 364.
 v. Hooglund, 467, 469.
 v. Moore, 273.
 D. B. Steelman, The, 439.
 Deal v. Maxwell, 100.
 Dean v. Dicker, 277.
 v. Emerson, 308, 324.
 v. James, 367.
 v. Nelson, 413.
 v. Richmond, 189.
 v. St. Paul & D. R., 366.
 Dearborn v. Bowman, 138.
 Dearden v. Adams, 175.
 Deason v. Boyd, 168.
 De Baun v. Brand, 258.
 Debenham v. Mellon, 501, 526, 527.
 De Bussche v. Alt, 511.
 De Camp v. Hamma, 198.
 Decell v. Lewenthal, 157, 158.
 Decker v. Saltsman, 290.
 Decosta v. Davis, 97.
 De Cremer v. Anderson, 24.
 Deering v. Chapman, 323.
 v. Thom, 519.
 v. Winchelsea, 534.
 Deering & Co. v. Cunningham, 286.
 Deford v. Dryden, 436.
 De Forest v. Strong, 273.
 De Graff v. Wickham, 412.
 De Gray v. Clubhouse Co., 375, 376.
 De Jarnett v. De Giverville, 147.
 Delamater v. Miller, 448.
 Delano v. Blake, 166, 169.
 v. Montague, 81.
 Delaplane v. Crenshaw, 399.
 Delashmutt v. Thomas, 44.
 Delavina v. Hill, 330.
 Delier v. Society, 277.
 De Long v. Lee, 392.
 Delp v. Brewing Co., 70.
 Demarest v. Willard, 365, 373.
 Demars v. Mfg. Co., 124.
 De Mattos v. Gibson, 490.
 De Mesnil v. Dakin, 540.
 Deming v. Bullitt, 517.
 v. Darling, 227.
 Denby v. Moore, 541, 544.
 Denison v. Crawford Co., 285.
 Denlar v. Hile, 94.
 Dennehy v. McNulta, 321.
 Dennett v. Dennett, 179, 180.
 Denning v. Yount, 346.
 Dennis v. Jones, 236.
 v. Maxfield, 488.
 v. Slyfield, 119.
 Dennison v. Insurance Co., 219.
 Denny v. Williams, 97.
 Dent v. Bennett, 247, 249.
 v. Ferguson, 116.
 v. Long, 253.
 v. Steamship Co., 15.
 Dentler v. O'Brien, 162.
 Denton v. Railroad Co., 38.
 Denver Fire Ins. Co. v. McClelland, 193.
 Denver & N. O. Const. Co. v. Stout, 295.
 Denver & N. O. R. Co. v. Railroad Co., 289.
 Deputy v. Stapleford, 246.
 Derby v. Johnson, 447, 485.
 v. Phelps, 81.
 v. Thrall, 483.
 Dermott v. Jones, 16, 473.
 Derocher v. Continental Mills, 175, 176.
 Derrett v. Bowman, 410.
 Derrick v. Monette, 36.
 Derringer v. Moynihan, 72.

[The figures refer to pages.]

- Derry v. Peak, 218.
 v. Peek, 230.
 Des Farges v. Pugh, 222.
 Desha v. Holland, 398.
 Deshazo v. Lewis, 426.
 Deshon v. Wood, 72.
 Desilver's Estate, In re, 181.
 Des Moines Nat. Bank v. Chisholm, 179.
 Desmond-Dunne Co. v. Friedman-Doscher Co., 431.
 De Sobry v. De Laistre, 300.
 Despatch Line v. Mfg. Co., 503, 513.
 Detwiler v. Bish, 198.
 Devall v. Burbridge, 509.
 Devaux v. Conolly, 545, 546.
 Devaynes v. Noble, 438, 439.
 Devecmon v. Shaw, 107, 114.
 Devine v. Edwards, 543, 545.
 Devlin v. Brady, 287.
 v. Chamblin, 436.
 v. New York, 364, 365.
 Devoe v. Brandt, 222.
 Dewees v. Miller, 276.
 Dewey v. Allgire, 179, 183.
 v. School Dist., 477.
 De Witt v. Root, 67.
 De Witt Wire-Cloth Co. v. Wire-Cloth Co., 313.
 De Wolf v. Chicago, 15.
 Dexter v. Hall, 154, 181.
 v. Norton, 476.
 v. Ohlander, 393, 394.
 Dey v. Dox, 450-452, 461.
 Deyo v. Ferris, 76, 283.
 Deyoe v. Woodworth, 283.
 Dial v. Wood, 151.
 Diamond Match Co. v. Roeber, 308, 309.
 Dick v. Page, 528.
 Dicken v. Johnson, 180.
 Dickerman v. Ashton, 500.
 v. Day, 271.
 Dickerson v. Colgrove, 219.
 v. Com'rs, 425.
 Dickinson v. Burrell, 299.
 v. Calaban's Adm'rs, 378.
 v. Dodds, 33, 34.
 v. Gay, 399.
 v. Richmond, 268.
 Dickson v. Kittson, 302.
 Diefenback v. Stark, 462.
 Dietz's Assignee v. Sutcliffe, 549.
 Diffenderfer v. Scott, 107.
 Di Iorio v. Di Brasio, 125.
 Dilk v. Keighley, 158.
 v. White, 415.
 Dillaby v. Wilcox, 69.
 Dillman v. Nadlehofer, 226, 227.
 Dillon v. Allen, 260, 265.
 v. Burnham, 177.
 Diman v. Railroad Co., 208.
 Dimmock v. Hallett, 219.
 Dingley v. Oler, 444.
 Dinsmore v. Tidball, 223.
 Directors, etc., of Ashbury Railway Carriage & Iron Co. v. Riche, 193.
 Disbrow v. Durand, 17, 549.
 Disbrow's Estate, In re, 247.
 District v. Gallaher, 407.
 District of Columbia v. Iron Works, 466.
 Ditchburn v. Goldsmith, 276.
 Ditson v. Ditson, 7.
 Divan v. Loomis, 375.
 Diversy v. Kellogg, 526.
 Dixon v. Bank, 56.
 v. Clarke, 440.
 v. Dunham, 398.
 v. Fletcher, 442.
 v. Merritt, 153.
 v. Olmstead, 540.
 D. M. Osborne & Co. v. Baker, 87.
 Doan v. Dow, 121.
 Doane v. Dunham, 463.
 v. Railroad Co., 288, 291.
 Dob v. Halsey, 382.
 Dobbins v. Cruger, 57.
 v. Hubbard, 188, 190, 191.
 Dobson v. Collis, 78, 79.
 Dodge v. Emerson, 436.
 v. Favor, 398.
 v. Insurance Co., 207, 208.
 Dodge's Adm'r v. Moss, 357.
 Dodson v. McAdams, 17.
 Doe v. Burnham, 261.
 v. Roberts, 154.
 v. Thompson, 516.
 Doebler v. Waters, 110.
 Doering v. Kenamore, 371.
 Doherty v. Doe, 65, 80.
 v. Hill, 86.
 Dohoney v. Dohoney, 269.
 Doles v. Hilton, 152.
 Doll v. Noble, 433.
 Dollman v. King, 404.
 Dolph v. Hand, 166, 169.
 v. Machinery Co., 315.

[The figures refer to pages.]

- Domenico v. Ass'n, 420.
 Dominick v. Randolph, 180.
 Donaldson v. Farwell, 222, 239.
 Donehoe's Appeal, 187.
 Donehoo, Appeal of, 272.
 Donellan v. Read, 80.
 Donelson v. Polk, 360, 373.
 Donovan v. Daiber, 279.
 v. Oil Co., 396.
 v. Richmond, 80.
 Doolin v. Ward, 258.
 Doolittle v. Dininny, 65.
 Doon v. Ravey, 538.
 Doran v. Eaton, 225.
 v. McConlogue, 250.
 Doremus v. Hennessy, 350.
 v. Lott, 18.
 v. Selden, 385, 534.
 Doringh, In re, 367.
 Dorr v. Fisher, 465.
 v. Munsell, 59.
 v. School Dist., 389.
 Dorrell v. Eaton, 252.
 Dorris v. Sullivan, 76.
 Dorsey v. Gassaway, 438.
 v. Kyle, 148.
 v. Railroad Co., 374, 376.
 v. Thompson, 148.
 v. Wolff, 273.
 Dorwin v. Smith, 107, 112.
 Doty v. Crawford, 442.
 v. Martin, 311, 478.
 v. Wilson, 139, 140.
 Dougan v. Blocher, 94.
 Dougherty v. Catlett, 74.
 v. Chesnutt, 86.
 v. Seymour, 328.
 Doughten v. Ass'n, 237.
 Doughty v. Brass Co., 88.
 v. Miller, 60.
 Douglas v. Matting, 198.
 v. West, 54.
 Douglass v. Howland, 24.
 v. Reynolds, 406.
 Dovalle v. Ackermann, 123.
 Dow v. Bank, 476.
 v. Haley, 264.
 v. Sanborn, 222.
 Dowagiac Mfg. Co. v. Schroeder, 229.
 Dowdall v. Canndy, 219.
 Dowden v. Cryder, 514.
 Dowdy v. McLellan, 471.
 Dowling v. Lawrence, 224.
 Down v. Halling, 541.
 Downer v. Chesebrough, 97.
 Downing v. Stone, 175.
 v. Wherrin, 236.
 Dows v. Swett, 71.
 Doyle v. Church, 244, 549.
 v. Dixon, 79, 113.
 Drake v. Seaman, 85, 87.
 v. Wells, 76.
 v. Whaley, 538.
 v. White, 474.
 v. Wise, 168.
 Drake's Appeal, 249.
 Drake's Lessees v. Ramsay, 166.
 Draper v. Fletcher, 367.
 v. Hitt, 442.
 v. Wood, 479.
 Drayton v. Reid, 430.
 Dreifus v. Salvage Co., 420.
 Drennan v. Douglas, 300.
 Dresser v. Dresser, 78.
 Drew v. Goodhue, 431.
 v. Nunn, 37, 528.
 Driver v. Broad, 75.
 Drude v. Curtis, 172, 173.
 Drum v. Drum, 482.
 Drumheller v. Surety Co., 412.
 Drummond v. Humphreys, 508.
 Drumright v. Philpot, 506.
 Drury v. Briscoe, 108.
 v. Wolfe, 271, 273.
 v. Young, 89, 90, 91.
 Dryfus v. Burnes, 274.
 Dubose v. Wheddon, 160.
 Ducett v. Wolf, 91.
 Ducie v. Ford, 94.
 Dudley v. Briggs, 350.
 Duer v. James, 53, 54, 55.
 Duff v. Hopkins, 88.
 v. Russell, 490.
 Duffy v. Shockey, 115.
 Dugan v. Gittings, 108, 114.
 v. Thomas, 295.
 Duke v. Asbee, 291.
 v. Harper, 297, 298.
 Duker v. Franz, 483.
 Dunbar v. Dunbar, 132.
 v. Railway Co., 320.
 v. Williams, 548.
 Duncan v. Baker, 462.
 v. Niles, 518.
 v. Topham, 26.
 v. Willis, 416.
 Dung v. Parker, 518.
 Dungan v. Insurance Co., 441.

[The figures refer to pages.]

Dunham v. Gould, 399.
 v. Griswold, 123, 243.
 v. Pitkin, 54.
 Dunlap v. Thorne, 71.
 Dunlop v. Higgins, 26, 31.
 Dunmore v. Alexander, 34.
 Dunn v. Bell, 278.
 v. Houghton, 416.
 v. Moore, 95.
 Dunne v. Herrick, 298.
 Dunton v. Brown, 150, 153, 165.
 Duplex Safety Boiler Co. v. Garden,
 433.
 Durant v. Rhener, 266.
 Durbin v. Kuney, 385.
 Durfee v. Abbott, 169.
 v. O'Brien, 80.
 Durgin v. Express Co., 20.
 v. Dyer, 261.
 Durham v. Hiatt, 77.
 Durkee v. Railroad Co., 204.
 Durkin v. Cobleigh, 394.
 Durment v. Tuttle, 471.
 Durnford v. Messiter, 349, 533.
 Durnherr v. Rau, 356, 357.
 Durr v. Chase, 395.
 Duryea v. Mayor, etc., 406.
 Dusenberry v. Hoyt, 140.
 Dusenbury v. Speir, 530, 531.
 Du Souchet v. Dutcher, 524.
 Dutton v. Poole, 352.
 Duval v. Neal, 272.
 v. Wellman, 303, 340, 540.
 Duvall v. Craig, 519.
 v. Graves, 154.
 Dwight v. Blackmar, 510.
 v. Hamilton, 307.
 v. Insurance Co., 404.
 v. Whitney, 515.
 Dwinel v. Howard, 455.
 Dyett v. Coal Co., 191.
 Dykers v. Townsend, 84, 85.
 Dykes v. Bottoms, 272.
 Dynan v. McColloch, 120.

E

Eadie v. Slimmon, 240, 241, 242.
 v. Williams, 495.
 Eagan v. Scully, 166.
 Eagan Co. v. Johnson, 467.
 Eagle v. Smith, 40.
 Eakin v. Shultz, 357.

Eames v. Preston, 53.
 Earl v. Peck, 112.
 Earle v. Angell, 4, 107, 117.
 v. Bickford, 545.
 v. Coburn, 548.
 v. Oliver, 140.
 v. Peale, 158.
 v. Reed, 153, 160, 548.
 Earl of Aylesford v. Morris, 247.
 East v. Worthington, 225.
 East Anglin Rys. Co. v. Railway Co.,
 193.
 Easter v. White, 70.
 Eastern Advertising Co. v. McGow,
 364.
 Eastern C. R. Co. v. Hawkes, 489.
 Eastland v. Burchell, 499.
 East Line & R. R. Co. v. Scott, 78.
 Eastman v. Wright, 5, 415.
 Easton v. Jones, 448.
 East Tennessee, V. & G. R. Co. v.
 Staub, 78.
 Eastwood v. Kenyon, 69, 109.
 Eaton v. Eaton, 182, 183.
 v. Hill, 176.
 v. Kegan, 263.
 Eaton, Cole & Burnham Co. v. Avery,
 231.
 Eaton's Adm'r v. Perry, 187.
 v. Smith, 403.
 v. Truesdail, 516.
 Eberstein v. Willets, 236, 246.
 Eberts v. Selover, 507.
 Eblin v. Miller's Ex'rs, 124, 126.
 Eccleston v. Clipsham, 382, 416.
 Echols v. Phillips, 53.
 Eckenrode v. Chemical Co., 444.
 Ecker v. McAllister, 124.
 Eckhart v. Pickel, 483.
 Eckman v. Railroad Co., 319.
 Eckstein v. Frank, 177.
 Edan v. Dudfield, 103.
 Eddy v. Capron, 283.
 v. Davis, 452.
 v. Herrin, 243.
 v. Roberts, 111.
 Eddy's Ex'r v. Northup, 272.
 Edelin v. Gough, 87.
 v. Sanders, 59.
 Edelmuth v. McGarren, 328.
 Eden v. Chaffee, 69.
 Edgar v. Boies, 452.
 Edge v. Bumford, 372.

[The figures refer to pages.]

- Edgell v. McLaughlin, 276.
 Edge Moore Bridge Works v. Bristol County, 43.
 Edgerly v. Hale, 261, 284.
 v. Shaw, 160.
 Edgerton v. Hodge, 104.
 v. Mathews, 105.
 Edison v. Balka, 364.
 Edmond's Case, 141, 142.
 Edmondston v. Drake, 24.
 Edmunds v. Illinois Cent. Ry., 365.
 v. Transportation Co., 200, 239.
 v. Wallingford, 536.
 Edson v. Gates, 369.
 v. Hudson, 222.
 Edwards v. Clement, 353.
 v. Davenport, 182.
 v. Estell, 301.
 v. Hoefflinghoff, 342.
 v. Insurance Soc., 389.
 v. Peterson, 366.
 v. Railroad Co., 98, 100.
 v. Randle, 283.
 v. Scott, 368.
 Edwards Co. v. Jennings, 323.
 Egan v. Insurance Co., 71.
 E. G. Dailey Co. v. Can Co., 120.
 Eggleston v. Mason, 505.
 v. Wagner, 28.
 Ehle v. Judson, 109.
 v. Purdy, 382, 415.
 Ehrmanntraut v. Robinson, 84, 505.
 Eichelberger v. McCauley, 100.
 Eicholz v. Bannister, 470, 545.
 Eikenberry v. Edwards, 505.
 Eiler v. Crull, 499.
 Eisel v. Hayes, 310.
 Elder v. Schumacher, 182.
 v. Thompson, 380.
 Elderkin v. Fellows, 442.
 Eldred v. Malloy, 276.
 Eldridge v. Holway, 512.
 Electric Appliance Co. v. Guaranty Co., 356.
 Electric Lighting Co. of Mobile v. Elder, 432, 433.
 Eley v. Assurance Co., 353.
 Eliason v. Henshaw, 27, 30.
 Elkhart County Lodge v. Crary, 287.
 Elkin v. Timlin, 70.
 Elkins v. Railroad Co., 522.
 Ellen v. Topp, 467.
 Ellenbogen v. Griffey, 272.
 Eller v. Lacy, 380.
 Ellerman v. Stock Yards Co., 307.
 Ellicott v. Turner, 79, 138.
 Elliot v. Barrett, 85.
 v. Bradley, 516.
 Elliott v. Bell, 415.
 v. Caldwell, 431.
 v. Dycke, 389.
 v. Horn, 152.
 v. Sackett, 208.
 v. Stocks, 500.
 v. Swartwout, 244.
 Ellis v. Alford, 161, 168.
 v. Andrews, 224.
 v. Bray, 85.
 v. Cary, 18.
 v. Cory, 552.
 v. Harrison, 358.
 v. Insurance Co., 63.
 v. Mason, 437.
 v. Murray, 68.
 v. Smith, 300.
 v. Thompson, 408.
 Ellison v. Water Co., 87.
 Ellmaker v. Ellmaker, 403.
 Ellsworth v. Cordrey, 510.
 v. Fogg, 419.
 Elmbank, The, 366.
 Elmer v. Loper, 356.
 Elmore v. Kingscote, 105.
 v. Stone, 103.
 Elrod v. Myers, 157.
 Elsass v. Harrington, 222.
 Eltham v. Kingsman, 276.
 Elting v. Vanderlyn, 123.
 Elves v. Crafts, 310.
 Elwell v. Shaw, 521.
 Ely v. Hallett, 214.
 Emancipation of Pocheleu, 152.
 Embrey v. Jemison, 334, 342.
 Emerson v. C. Aultman & Co., 87.
 v. Mfg. Co., 511.
 v. Miller, 502.
 v. Slater, 107.
 v. Townsend, 277, 331, 335.
 Emery v. Boyle, 413.
 v. Candle Co., 315, 337.
 v. Fowler, 405.
 v. Kempton, 326.
 v. Lawrence, 365.
 v. Tichout, 439.
 Emmel v. Hayes, 93.
 Emmeluth v. Ass'n, 383.
 Emmittsburgh R. Co. v. Donoghue, 125, 130.

[The figures refer to pages.]

- Emmons v. Murray**, 168.
 v. Scudder, 541.
Empire Steam Pump Co. v. Inman, 16.
Empress Engineering Co., In re, 353.
Enders v. Enders, 305.
Engelhorn v. Reitlinger, 393.
England v. Davidson, 127, 137.
 v. Marsden, 536.
Engle v. Chipman, 282, 283.
Englebert v. Troxell, 173.
English v. Commission Co., 463, 467.
 v. Smock, 273.
English's Ex'r v. McNair's Adm'rs, 405.
Ennis v. Ennis, 73.
Enos v. Sanger, 356, 357.
Ensor v. Bolgiano, 350.
Enys v. Donnithorne, 383.
Eppens, Smith & Wiemann Co. v. Littlejohn, 408.
Epperson v. Nugent, 158.
Equitable Co-op. Foundry Co. v. Hersee, 237.
Equitable Endowment Ass'n v. Fisher, 22.
Equitable Gaslight Co. v. Mfg. Co., 95.
Erb v. Brown, 128.
Erickson v. Fisher, 228.
Erie Co. Sav. Bank v. Coit, 122.
Ernst v. Crosby, 328.
Erskine v. Adeane, 394.
Erwin v. Erwin, 40, 44.
Esch v. White, 70.
Eskridge v. Glover, 32, 33, 35.
Esmay v. Gorton, 28.
Espalla v. Wilson, 96.
Esposito v. Bowden, 475.
Estabrook v. Swett, 237.
Esterly v. Eppelsheimer, 198.
Esterly Harvesting Mach. Co. v. Frolkey, 507.
Etheredge v. Barkley, 21.
Etheridge v. Vernoy, 366.
Etscheid v. Baker, 357.
Eugster v. West, 473.
Evans, In re, 298, 299.
 v. Bell, 298.
 v. Evans, 304.
 v. Gale, 238.
 v. Hoare, 89.
 v. Horan, 182.
 v. Jones, 276.
 v. Kneeland, 217.
 v. Mfg. Co., 397.
Evans v. Miller, 549.
 v. Morgan, 178.
 v. Railroad Co., 429.
 v. Roberts, 76.
 v. Trenton, 284.
Eveleth v. Sawyer, 384.
Everdell v. Hill, 355.
Everett v. Dilley, 43.
 v. Saltus, 515.
Everhart v. Searle, 302.
Everingham v. Meighan, 124, 278, 333, 342.
Everitt v. Walker, 41.
Everman v. Herndon, 83.
 v. Hyman, 40.
Everson v. Carpenter, 167.
 v. Granite Co., 205.
Ewell v. Daggs, 346.
Ewing v. Burnet, 405.
 v. Wilson, 390.
Ewins v. Gordon, 119.
Exall v. Partridge, 534.
Excelsior Needle Co. v. Smith, 404, 486.
Excelsior Wrapper Co. v. Messinger, 120.
Exchange Bank v. Rice, 353-355.
Exchange Nat. Bank v. Bank, 479, 511.
Exhaust Ventilation Co. v. Railroad Co., 433.
Exhaust Ventilator Co. v. Railroad Co., 433.
Exley v. Berryhill, 274.
Eyre v. Potter, 112.

F

- Fairbank Canning Co. v. Metzger**, 464.
Fairbanks v. Metcalf, 56.
 v. Snow, 154, 245, 246.
Fairchild v. Holly, 439.
 v. Railroad Co., 343.
 v. Rogers, 488.
Fair Haven Marble & Marbleized Slate Co. v. Owens, 54.
Fairplay School Tp. v. O'Neal, 44.
Faithorne v. Blaquire, 189.
Falconbury v. Kendall, 133.
Fall v. Hazelregg, 81.
Fallows v. Taylor, 59.
Falls of Neuse Mfg. Co. v. Hendricks, 86.
Fanning v. Dunham, 274.
Fanson v. Linsley, 539.

[The figures refer to pages.]

- Fant v. Miller, 345.
 Farebrother v. Simmons, 90.
 Fareira v. Gabell, 342.
 Fargo Gas & Coke Co. v. Electric Co., 228.
 Farina v. Home, 103.
 Faris v. King, 335.
 Farley v. Cleveland, 69.
 v. Parker, 182.
 Farmer v. Russell, 337.
 Farmers' Ass'n v. Scott, 230.
 Farmers' Co-op. Trust Co. v. Floyd, 518.
 Farmers' & Mechanics' Bank v. Kercheval, 24.
 Farnam v. Brooks, 179.
 Farnham v. Chapman, 71.
 v. Davis, 72.
 v. O'Brien, 109.
 Farnsworth v. Telegraph Co., 76.
 Farrar v. Bessey, 188.
 v. Churchill, 232.
 v. Toliver, 419-421.
 Farrer v. Close, 317.
 Farrington v. Meek, 508.
 v. Ware, 238.
 Farrow v. Wilson, 476.
 Farwell v. Becker, 535.
 v. Hanchett, 222.
 v. Lowther, 84.
 v. Mather, 86.
 v. Webster, 269.
 Fasler v. Beard, 412.
 Faulkner v. Adams, 55.
 v. Drug Co., 43.
 v. Hebard, 34.
 v. Lowe, 5.
 Faulknor v. Swart, 369.
 Fauntleroy v. Wilcox, 219.
 Favor v. Philbrick, 325.
 Fawcett v. Freshwater, 126.
 Fawcett & Holmes, In re, 216.
 Fawknor v. Wall-Paper Co., 395.
 Fay v. Guynon, 362.
 v. Smith, 481.
 Fayette Co. Sav. Bank v. Steffes, 198.
 Featherston v. Hutchinson, 323.
 Feckheimer v. Baum, 222.
 Feeney v. Howard, 95.
 Fehlinger v. Wood, 66, 69.
 Feiertag v. Feiertag, 17.
 Feldman v. Beier, 436.
 v. Gamble, 437.
 v. McGuire, 357.
 Feller v. Green, 241.
 Fellows v. Stevens, 133.
 Felthouse v. Bindley, 22, 23.
 Felton v. Dickinson, 355.
 v. Gregory, 242.
 Fenner v. Lewis, 501.
 v. Mears, 363.
 Fenton v. Clark, 550.
 v. White, 160.
 Ferguson v. Bell's Adm'r, 163, 169.
 v. Bobo, 178.
 v. Carrington, 235, 549.
 v. Coleman, 275.
 v. Crick, 74.
 v. Davidson, 368.
 v. Sutphen, 270.
 v. Teel, 470.
 v. Wilson, 192.
 v. Yunt, 339.
 Ferguson's Appeal, 113.
 Fergusson v. Norman, 265.
 Ferren v. Moore, 499.
 Ferrier v. Storer, 26, 31.
 Ferris v. Brewing Co., 307, 356.
 v. Land Co., 145.
 Ferry v. Moore, 523.
 Ferst v. Bank, 69, 71.
 Fessenden v. Mussey, 84.
 v. Taft, 343.
 Fetrow v. Wiseman, 151, 153, 154.
 Fidelity Ins. & Safe-Deposit Co. v. Railway Co., 259.
 Fidelity & Casualty Co. of New York v. Crays, 294.
 Fidelity & Casualty Co. of New York v. Eickhoff, 294.
 Field v. Chipley, 284.
 v. Dale, 138.
 v. Herrick, 163.
 v. Holland, 438.
 v. Leiter, 403, 405.
 v. Mayor, 366.
 v. New York, 366.
 Fightmaster v. Levi, 245.
 Fildew v. Besley, 473.
 Filipini v. Stead, 423.
 Filley v. Pope, 463, 464.
 Fillieul v. Armstrong, 430.)
 Finch v. Barclay, 263.
 v. Finch, 72.
 v. Mansfield, 23.
 Findley's Ex'rs v. Findley, 403.
 Findon v. Parker, 297, 298.
 Finegan v. Theisen, 249.

(The figures refer to pages.)

- Finger v. Hahn, 307.
 Fink v. Cox, 108.
 v. Smith, 125.
 Finlay v. Chirney, 378.
 Finn v. U. S., 145.
 Finney v. Apgar, 100.
 Firestone v. Werner, 222, 223.
 First Baptist Church v. Insurance Co.,
 63, 78.
 First Nat. Bank v. Bryan, 245.
 v. Buchanan, 435.
 v. Bynum, 369.
 v. Canatsey, 273.
 v. Carriage Co., 238.
 v. Carson, 483.
 v. Case, 436.
 v. Chalmers, 70, 71.
 v. Clark, 29, 37.
 v. Dunn, 393.
 v. Gaines, 500.
 v. Gay, 503.
 v. Gerke, 403.
 v. Hall, 21, 29, 36, 346, 422.
 v. Hamor, 380.
 v. Hart, 38.
 v. Hendrie, 288.
 v. Johns, 199.
 v. Johnson, 437.
 v. Kimberlands, 366.
 v. Kingsley, 266.
 v. North, 394.
 v. Spear, 452.
 v. State, 284.
 v. Taliaferro, 399.
 v. Watkins, 23.
 v. Wolff, 481.
 First Universalist Church v. Pungs,
 118.
 Fish v. Chapman, 429.
 v. Cleland, 206, 223, 226.
 Fishback v. Ball, 401.
 Fishburne v. Ferguson's Heirs, 180,
 251.
 Fishel v. Bennett, 326, 329.
 Fishell v. Gray, 323.
 Fisher v. Anderson, 272.
 v. Bartlett, 113.
 v. Bishop, 247, 250.
 v. Bridges, 333.
 v. Hall, 53.
 v. Hildreth, 339.
 v. Hoover, 272.
 v. Hopkins, 381.
 v. Insurance Co., 295.
 Fisher v. Lighthall, 221.
 v. May's Heirs, 122.
 v. Mellen, 229.
 v. Mowbray, 153.
 v. Shattuck, 240, 242, 245.
 Fisher Electric Co. v. Iron Works, 289.
 Fisheries Co. v. Lennen, 307.
 Fitch v. Johnson, 373.
 v. Jones, 334.
 v. Snedaker, 40.
 v. Sutton, 133.
 v. Water Co., 352.
 Fitts v. Hall, 176, 177.
 Fitz v. Bynum, 238.
 Fitzgerald v. Bank, 402.
 v. Dressler, 71.
 v. Peck, 226.
 v. Reed, 183.
 Fitzhugh v. Wilcox, 182.
 Fitzsimmons v. Allen's Adm'r, 94.
 Fivey v. Railroad Co., 197.
 Flach v. Gottschalk Co., 184.
 Flack v. Garland, 491.
 Flagg v. Gilpin, 278.
 v. Inhabitants, 267.
 Flagler v. Lipman, 71.
 Flanagan v. Hambleton, 435.
 Flanders v. Fay, 426.
 Flandrow v. Hammond, 470.
 Flanigan v. Minneapolis, 241.
 v. Seelye, 441.
 Flaniken v. Neal, 375.
 Flarsheim v. Brestup, 437.
 Fleekenstein Bros. Co. v. Fleeken-
 stein, 364.
 Fleetwood v. Brown, 201.
 Flegal v. Hoover, 419.
 Fleit v. Murton, 520.
 Fleming v. Beck, 487.
 v. Gilbert, 425.
 v. Hanley, 236.
 Flenner v. Flenner, 72, 73.
 Flersheim v. Cary, 323.
 Fletch v. Dyche, 412.
 Fletcher v. Grover, 385, 534.
 v. Livingston, 76.
 v. Peck, 7.
 Flexner v. Dickerson, 154.
 Flight v. Bolland, 163.
 v. Booth, 216.
 v. Reed, 142.
 Flinn v. Mowry, 445.
 v. St. John, 269.
 Flint v. Cadenasso, 356, 357.

[The figures refer to pages.]

- Florance v. Adams, 510.
 Florida v. Morrison, 218.
 Florida, C. & P. R. Co. v. State, 288.
 Flower v. Barneckoff, 75.
 v. Sadler, 294.
 Floyd Acceptance, The, 145.
 Flynn v. Allen, 238.
 v. Columbus Club, 270.
 v. Dougherty, 99.
 v. Hurlock, 130.
 Foakes v. Beer, 130.
 Foard v. Grinter's Ex'rs, 123.
 v. McComb, 218.
 Foley v. Cowgill, 56.
 v. Crow, 216, 236, 466.
 v. Dwyer, 453.
 v. Greene, 242, 293, 340.
 v. Mason, 398.
 v. Platt, 283.
 v. Storrie, 128.
 Follansbee v. Johnson, 357.
 Follett v. Buyer, 369.
 Fonda v. Burton, 393.
 v. Van Horne, 150, 154, 505.
 Fond du Lac Harrow Co. v. Haskins, 415.
 Fonseca v. Steamship Co., 20, 343, 345.
 Fontaine v. Bush, 103.
 Foote v. Hambrick, 483.
 v. Nickerson, 303, 322.
 Forbes v. Hagman, 503.
 v. McDonald, 283.
 Force v. Dutcher, 500.
 Ford v. Beach, 403.
 v. Cotesworth, 472.
 v. Harrington, 340.
 v. Hennessy, 249.
 v. Mitchell, 436.
 v. Phillips, 167.
 v. Tiley, 448.
 v. Tirrell, 399.
 Fordyce v. Nelson, 366.
 Foreman v. Bigelow, 235.
 Forest Oil Co., Appeal of, 442.
 Formby v. Pryor, 286, 287.
 Forrester v. Flores, 93.
 Forsyth v. Day, 504.
 v. Ryan, 367.
 v. Woods, 301.
 Forsyth Mfg. Co. v. Castlen, 280.
 Forsythe v. State, 300.
 Fort v. Allen, 74, 75.
 Fortunato v. Patten, 370.
 Ft. Worth City Co. v. Bridge Co., 193.
 Fosdick v. Insurance Co., 219.
 v. Van Arsdale, 294.
 Foshay v. Ferguson, 240-243.
 Foss v. Cummings, 342.
 v. Hildreth, 186.
 v. Richardson, 471.
 Foster v. Bartlett, 540.
 v. Bates, 503, 504.
 v. Burton, 385, 534.
 v. Dawber, 419.
 v. Dupre, 537.
 v. Green, 541.
 v. Hooper, 381.
 v. Ley, 535.
 v. McKinnon, 198.
 v. Maginnis, 94.
 v. Paine, 422.
 v. Peyser, 221.
 v. Smith, 522.
 v. Thurston, 329.
 v. Wooten, 269.
 Fountain v. Menard, 75.
 Fountain Coal Co. v. Phelps, 510.
 Fontaine v. Bush, 97, 103.
 Fowke v. Bowie, 437.
 Fowkes v. Ass'n, 406.
 Fowle v. Freeman, 43.
 v. Park, 309, 312.
 Fowler, Appeal of, 343.
 v. Brooks, 126.
 v. Callan, 297.
 v. Fowler, 401.
 v. Insurance Co., 214, 277.
 v. McCann, 233.
 v. Trust Co., 273.
 v. Woodward, 208, 404.
 Fox v. Ass'n, 295.
 v. Davis, 303.
 v. Kitton, 444.
 v. Rogers, 326.
 v. Tabel, 199.
 Fox Solid Pressed Steel Co. v. Schoen, 308.
 Fradley v. Hyland, 523.
 Fraley v. Bentley, 45.
 Fraley's Appeal, 367.
 Frame v. August, 69.
 France v. Smith, 275.
 Francis v. Barry, 86.
 Francisco v. Smith, 364.
 Franco-Texan Land Co. v. Chaptive, 147.
 Franklin v. Long, 98, 464.

[The figures refer to pages.]

- Franklin v. Miller, 466.
 Franklin Min. Co. v. Harris, 430.
 Frank v. Eltringham, 84.
 Franklin v. Long, 98.
 Franklin Ins. Co. v. Hamill, 421, 425.
 Frank's Appeal, 114.
 Frary v. Rubber Co., 428.
 v. Sterling, 80.
 Fraser v. Backus, 122.
 Frazer v. Gates, 78.
 v. Howe, 86.
 v. Miller, 439.
 Frazier v. Massey, 153.
 v. Warfield, 346, 399.
 Frear v. Evertson, 362.
 v. Hardenbergh, 75.
 Freed v. Mills, 44.
 Freeman v. Boston, 39.
 v. Bridger, 157, 158.
 v. Kieffer, 237.
 v. Roland, 176.
 v. Taylor, 466.
 Freer v. Lake, 403.
 Freeth v. Burr, 454.
 French v. McAndrew, 153, 175.
 v. Parker, 310, 311.
 v. Pearce, 407.
 v. Shoemaker, 240.
 v. Vining, 224.
 French Lumbering Co. v. Theriault, 182.
 French's Heirs v. French, 186.
 Frenzel v. Miller, 218.
 Frerking v. Thomas, 357.
 Frevall v. Fitch, 53.
 Freyman v. Knecht, 464.
 Fridge v. State, 441.
 Frieberg v. Treitschke, 257.
 Fried v. Insurance Co., 22.
 Friend v. Lamb, 235.
 v. Miller, 293, 390.
 Friend Bros. Clothing Co. v. Hulbert, 237.
 Friend & T. Lumber Co. v. Miller, 487.
 Frisbee v. Hoffnagle, 471.
 Frisby v. Ballance, 208.
 Frith v. Lawrence, 37.
 Fritzler v. Robinson, 201.
 Front St. R. Co. v. Butler, 451.
 Frost v. Belmont, 285.
 v. Gage, 257, 337.
 v. Johnson, 492.
 v. Knight, 444, 445.
 Fruin v. Railway Co., 397, 412.
 Fruitt v. Anderson, 181.
 Fry v. Patterson, 436.
 v. Platt, 85.
 Fullam v. Inhabitants, 517, 521.
 Fuller v. Brown, 476, 550.
 v. Dame, 288.
 v. Duren, 538.
 v. Green, 335, 480, 482.
 v. Kemp, 132, 492.
 v. Roberts, 244.
 Fullerton v. Sturges, 482.
 Fullmer v. Poust, 453.
 Fulton v. Loughlin, 122.
 Funk v. Hough, 107, 117.
 Furenes v. Mickleson, 147.
 Furry v. O'Connor, 231.
- G**
- Gaar, Scott & Co. v. Green, 128.
 Gabbey v. Forgeus, 240.
 Gaffney v. Hayden, 164, 175, 553.
 Gage v. Ewing, 494.
 v. Fisher, 301, 323.
 v. Tirrell, 403.
 Gaines, Succession of, 152.
 Gainesville Nat. Bank v. Bramberger, 231.
 Gaither v. Clarke, 271.
 Galbes v. Girard, 145.
 Galbreath v. Galbreath, 95.
 Gale v. Leckie, 256.
 v. Nixon, 82.
 v. Tappan, 528.
 Galey v. Mellon, 365.
 Gallagher v. Gallagher, 93.
 v. Sharpless, 431.
 Gallinger v. Traffic Co., 514.
 Galloway v. Holmes, 549.
 Gallup v. Lichter, 494.
 Galt v. Galloway, 528.
 Galusha v. Sherman, 125, 241.
 Galveston, H. & S. A. R. Co. v. Short, 320.
 Galvin v. Mackenzie, 102.
 Galway v. Shields, 91, 552.
 Gambril v. Doe, 272.
 Gambs v. Sutherland's Estate, 330.
 Gamewell Fire-Alarm Tel. Co. v. Crane, 308.
 Gammill v. Johnson, 228.
 Gangwere's Estate, 183.
 Gano v. Aldridge, 405.
 Garberino v. Roberts, 448.

[The figures refer to pages.]

- Gardels v. Kloke, 88.
 Gardiner v. Harbeck, 484.
 v. Morse, 258.
 Gardner v. Caylor, 422.
 v. Gardner, 500.
 v. Lane, 202.
 v. Leck, 439.
 v. Ogden, 510.
 v. Peaslee, 523.
 v. Randell, 75.
 v. Smith, 366.
 v. Walsh, 481, 482.
 Garfield v. Paris, 101, 102.
 Garland v. Harrington, 365.
 Garner v. Cook, 162.
 Garnett v. Kirkman, 123.
 Garrard v. Frankel, 401.
 Garretson v. Vanloon, 409.
 Garrett v. Moss, 258.
 v. Trabue, 528.
 Garrey v. Stadler, 149.
 Garrison v. Electrical Works, 233.
 v. U. S., 406.
 Garst v. Harris, 316, 413.
 Gartner v. Hand, 22.
 Gartrell v. Stafford, 89.
 Garvin's Adm'r v. Williams, 249.
 Gasper v. Heimbach, 392.
 Gates v. Brower, 501.
 v. Dundon, 244.
 v. Nelles, 42.
 v. Raymond, 238.
 v. Steele, 132.
 Gatling v. Newell, 238.
 Gatzow v. Buening, 317.
 Gauch v. Insurance Co., 397.
 Gault v. Brown, 102.
 v. Stormount, 85.
 Gavagan v. Bryant, 198.
 Gavin v. Bishoff, 501.
 v. Burton, 151, 152.
 Gaw v. Bennett, 280.
 Gay v. Ballou, 159, 548.
 v. Botts, 109.
 Gaylord v. Soragen, 329, 330.
 Gazley v. Price, 452, 459.
 Geddes' Appeal, 225, 226.
 Geelan v. Reid, 68.
 Geer v. Frank, 298, 323.
 v. School Dist., 383.
 Geib v. Reynolds, 201.
 Geiger v. Railroad Co., 429.
 Geipel v. Smith, 428.
 Geisse v. Franklin, 509.
 Gelpcke v. Dubuque, 324.
 Gelston v. Sigmund, 44.
 Genereux v. Sibley, 150, 158, 174.
 Genet v. Canal Co., 408.
 George v. Conhaim, 43.
 v. Johnson, 223.
 Georgia Pac. R. Co. v. Brooks, 236.
 Gere v. Clark, 381.
 Gerhart v. Peck, 90.
 Gerlach v. Skinner, 323.
 Gerli v. Mfg. Co., 455.
 German American Ins. Co. v. Insurance Co., 398.
 German Fire Ins. Co. v. Roost, 403.
 German Sav. Bank v. Roofing Co., 24.
 German State Bank v. Light Co., 356, 357.
 Gerrard v. Frankel, 205.
 Gerrish v. Glines, 480.
 Gerry v. Stimson, 57.
 Gerz v. Weber, 17.
 Getchell v. Maney, 366.
 Gettysburg Nat. Bank v. Chisholm, 479.
 Ghegan v. Young, 374.
 Gibbins v. Asylum District, 43.
 Gibbons v. Bente, 446.
 v. Ellis, 392.
 v. Gouverneur, 277.
 Gibbs v. Gas Co., 288, 309, 342.
 v. Linabury, 198.
 v. Smith, 258.
 Gibbs & Sterrett Mfg. Co. v. Brucker, 269.
 Gibson v. Carruthers, 365.
 v. Cooke, 366.
 v. Cranage, 432.
 v. Hardware Co., 502.
 v. Holden, 375.
 v. Holland, 83.
 v. Partee, 56.
 v. Pelkie, 201.
 v. Porter, 375.
 v. Soper, 182-185.
 v. Stearns, 274.
 v. Stevens, 516.
 v. Trust Co., 359.
 Giddings v. Bank, 245.
 Gieske v. Anderson, 359.
 Gifford v. Corrigan, 54, 356-358.
 v. Thorn, 116.
 Gilbert v. Baxter, 29.
 v. Deshon, 501.
 v. Holmes, 298, 527.

[The figures refer to pages.]

- Gilbert v. McGinnis, 400.
 v. Plow Co., 392.
 v. Sanderson, 357.
 v. Sykes, 276.
 Gilchrist v. Manning, 237.
 Giles v. Edwards, 471, 545.
 Gill v. Bicknell, 90.
 v. Ferris, 307.
 v. Lumber Co., 453.
 v. Weller, 367.
 Gillaspie v. Kelly, 483.
 Gilleland v. Failing, 298.
 Gillespie, In re, 370.
 v. Edmonston, 35.
 Gillespie Tool Co. v. Wilson, 431.
 Gillet v. Bank, 405, 406.
 Gillett v. Bank, 404.
 v. Logan Co., 292.
 Gilley v. Gilley, 548.
 Gillighan v. Boardman, 87.
 Gilliland v. Phillips, 346.
 Gillis v. Cobe, 432.
 v. Goodwin, 174, 175.
 Gilman v. Hall, 550.
 v. Kibler, 22.
 v. Peck, 435.
 v. Rives, 380.
 Gilmore v. Bissell, 273.
 v. Courtney, 460.
 v. Ferguson, 272.
 v. Lewis, 283.
 v. Pope, 516.
 v. Wilbur, 537, 538.
 Gilpin v. Howell, 522.
 Gilson v. Spear, 176.
 Ginn v. Security Co., 273.
 Given v. Lemoine, 515.
 Glacius v. Black, 431.
 Glaholm v. Hays, 211.
 Glanholm v. Hays, 464.
 Glascock v. Lyons, 537.
 Glasgow v. Hobbs, 113.
 Glass v. Beach, 108.
 v. Hulbert, 93-95.
 Glasscock v. Glasscock, 53.
 v. Hazell, 538.
 Glaze v. Insurance Co., 54.
 Glazebrook v. Woodrow, 451.
 Gleason v. Dyke, 140.
 v. Railroad Co., 257, 301.
 Glencoe Land & Gravel Co. v. Com-
 mission Co., 350.
 Glenn v. Bank, 335.
 v. Canby, 375.
 Glenn v. Marbury, 362.
 v. Savage, 548.
 v. Shannon, 542.
 Glidden v. Chamberlin, 141.
 Globe Milling Co. v. Elevator Co., 399.
 Gloucester Isin-Glass & Glue Co. v.
 Cement Co., 316, 469.
 Glover v. Ott's Adm'r, 159.
 Glover & Co. v. Ott's Adm'r, 155, 156.
 Glyn v. Baker, 541.
 Godcharles v. Wigeman, 260, 399.
 Goddard v. Binney, 100.
 v. Donaha, 93.
 v. O'Brien, 492.
 Goebel v. Linn, 128.
 Goldbeck v. Bank, 381.
 Goldberg v. Lavinski, 81.
 Golding v. Golding, 249.
 Goldman v. Oppenheim, 258.
 Goldsborough v. Cradie, 38, 369.
 v. Orr, 452.
 Goldsby v. Robertson, 138.
 Goldsmith v. Guild, 410, 462.
 Goldstein v. White, 462.
 Goltra v. Sanasack, 207.
 Gompertz v. Bartlett, 200, 469.
 v. Denton, 464, 540, 546.
 Gooch v. Faucett, 345.
 v. Holmes, 100.
 Good v. Cheesman, 133.
 v. Daland, 316.
 v. Elliott, 276.
 v. Herr, 207.
 Goodal v. Thurman, 223, 300.
 Goodall v. Brewing Co., 330.
 v. Stewart, 237.
 Goode v. Harrison, 161.
 Goodlet v. Kelly, 54.
 Goodloe v. Godley, 513.
 Goodman v. Alexander, 157.
 v. Chase, 68.
 v. Eastman, 481.
 v. Henderson, 308.
 Goodnow v. Lumber Co., 166.
 Goodrich v. Lathrop, 238.
 v. Reynolds, 273.
 v. Tenney, 292.
 Goodsell v. Myers, 153, 167.
 Goodspeed v. Fuller, 390, 546.
 v. Plow Co., 37.
 Goodwin v. Bishop, 274.
 v. Cunningham, 369.
 v. Follett, 129.
 v. Gilbert, 64.

[The figures refer to pages.]

- Goodwin v. Griffis, 549.
 v. Merrill, 16.
 v. Screw Co., 192.
 v. Trust Co., 230.
 Goodyear v. Adams, 182.
 Gordon v. Robertson, 483.
 Gordon v. Avery, 86.
 v. Bank, 385.
 v. Bulkeley, 500.
 v. Butler, 224, 225.
 v. Casey, 291.
 v. Gordon, 129.
 v. Parmelee, 224.
 Gore v. Gibson, 186, 187.
 v. Lewis, 399.
 Gorham v. Keyes, 293.
 Gorman v. Salisbury, 426.
 Gormely v. Ass'n, 226.
 Gormley, Appeal of, 125.
 Gorrell v. Water Supply Co., 352, 356.
 Gorrige v. Reed, 340.
 Goshen Nat. Bank v. Bingham, 372.
 Goss v. Ellison, 132.
 v. Nugent, 426.
 v. Stevens, 502, 506
 v. Whitney, 266.
 Gotwalt v. Neal, 240, 337, 540.
 Goucher v. Ass'n, 215.
 Goudy v. Gebhart, 60.
 Gould v. Banking Co., 94.
 v. Bourgeois, 470.
 v. Gould, 382, 416.
 v. Kendall, 290.
 v. Mansfield, 74.
 v. Murch, 472, 476.
 v. Railroad Co., 494.
 v. Wise, 53.
 Goulding v. Davidson, 141.
 Gove v. Biddleford, 489.
 Governor v. Daily, 497.
 Gowan's Adm'r v. Gowan, 338.
 Gower v. Capper, 117.
 v. Emery, 508.
 v. Stuart, 69.
 Grabenhorst v. Nicodemus, 33.
 Grace v. Hale, 159.
 v. Lynch, 80.
 v. Mitchell, 508.
 Gradle v. Warner, 84, 105, 441.
 Grady v. Insurance Co., 511.
 Graeme v. Adams, 272.
 Graff v. Buchanan, 21.
 v. Fitch, 76.
 Graft v. Loucks, 95.
 Grafton v. Cummings, 84, 85.
 Gragg v. Brown, 510.
 Graham v. Burch, 249, 253.
 v. Duckwall, 517.
 v. Dyster, 541.
 v. Holt, 500.
 v. Johnson, 370.
 v. McReynolds, 298.
 v. Marks, 245.
 v. Stiles, 224.
 v. Tilford, 369.
 Graham Paper Co. v. Pembroke, 370.
 Grain v. Aldrich, 366.
 Grandin v. Grandin, 112, 123, 125.
 Grand Lodge I. O. G. T. v. Farnham, 119.
 Grand Tower & C. G. R. Co. v. Wal-ton, 390.
 Grant v. Grant, 17, 74, 226.
 v. Johnson, 452, 465.
 v. Ludlow, 364.
 v. McGrath, 269.
 v. McLachlin, 343.
 v. Railway Co., 129.
 v. U. S., 120.
 v. Wolf, 68.
 Grape Creek Coal Co. v. Spellman, 490.
 Grasselli v. Lowden, 115.
 Graves v. The Calvin S. Edwards, 428.
 v. Johnson, 329, 345.
 v. Legg, 451, 458, 461, 465, 466.
 v. Tucker, 56.
 Gray v. Cary, 103.
 v. Clark, 403.
 v. Handkinson's Heirs, 471.
 v. Herman, 69.
 v. Hook, 283.
 v. McReynolds, 257.
 v. Mathias, 301.
 v. Otis, 497.
 v. Pearson, 359.
 v. Smith, 461.
 Graybill v. Brugh, 33, 119.
 Great Britain Steamboat Co., In re, 340.
 Great Northern R. Co. v. Witham, 35, 120.
 Great Western Turnpike Co. v. Sha-fer, 78.
 Grebert-Borgnis v. Nugent, 486.
 Green v. Armstrong, 76.
 v. Brookins, 99.

[The figures refer to pages.]

- Green v. Cole, 43.
 v. Corrigan, 340.
 v. Covillaud, 410.
 v. Gilbert, 477, 550.
 v. Green, 166, 173.
 v. Greenbank, 177.
 v. Groves, 94.
 v. Insurance Co., 215.
 v. Langdon, 130.
 v. Lewis, 105.
 v. Merriam, 103.
 v. Moffett, 399.
 v. Paul, 420.
 v. Roworth, 247, 249.
 v. Solomon, 69.
 v. State, 145.
 v. Stone, 401.
 v. Stuart, 469.
 v. Wells, 425.
 v. Wilding, 150.
 v. Wilkie, 198.
 Greenburg v. Early, 430.
 Greenby v. Wilcocks, 362.
 Greene v. Bartholomew, 365.
 v. Bateman, 204.
 v. Burton, 68.
 v. First Parish in Malden, 137.
 v. Greene, 249.
 v. Hatch, 369.
 v. Latcham, 69, 72.
 v. Tyler, 399.
 Greenfield Sav. Bank v. Simons, 510.
 Greenfield's Estate, 248.
 Greenleaf v. Allen, 374.
 Greenough v. Eichholtz, 72.
 Greenstine v. Borchard, 400.
 Greenville v. Waterworks Co., 83.
 Greenwood v. Curtis, 343, 344.
 v. Law, 100.
 v. Sheldon, 356.
 v. Strother, 81.
 v. Sutcliffe, 442.
 Greer, Hawes & Co. v. Severson, 291.
 Gregg v. Garrett, 83.
 Gregory v. King, 291.
 v. Lee, 160.
 v. Littlejohn, 391.
 v. Logan, 87.
 v. Pierce, 190.
 v. Thomas, 478.
 v. Walker, 54.
 v. Wattowa, 280.
 v. Wendell, 199, 278, 332, 342.
 Greig v. Riordan, 307.
 Greton v. Smith, 552.
 Grey v. Tubbs, 409.
 Gribben v. Maxwell, 183.
 Gridley v. Bane, 239.
 Griel v. Lomax, 223.
 v. Solomon, 141.
 Grierson v. Mason, 393.
 Grieser v. Hall, 274.
 Griffin v. Colver, 486, 488.
 v. Ogletree, 408.
 v. O'Neil, 205.
 Griffith v. Godey, 251.
 v. Publishing Co., 365.
 v. Schwenderman, 153.
 v. Wells, 260, 261, 265.
 Griffiths v. Owen, 104.
 Grigg v. Landis, 409, 462.
 Griggs v. Moors, 453.
 Grigsby v. Combs, 74.
 v. Stapleton, 224.
 Grim v. Iron Co., 355.
 Grime v. Borden, 303.
 Grindrod v. Wolf, 116.
 Grinnell v. Telegraph Co., 320.
 Grissell v. Robinson, 534.
 Griswold v. Butler, 182.
 v. Eastman, 58.
 v. Hazard, 207.
 v. Railroad Co., 360.
 v. Waddington, 148.
 Grizewood v. Blane, 279.
 Groff v. Hansel, 238.
 v. Rohrer, 218.
 Groner v. Smith, 53.
 Gross v. Cadwell, 41.
 v. Criss, 435.
 Groton v. Inhabitants, 282.
 Grove v. Dubois, 516.
 v. Rentch, 393.
 Grubb v. Sult, 378.
 Grumley v. Webb, 510.
 Grundies v. Kelso, 96.
 Grymes v. Sanders, 208, 236.
 Guardian Fire & Life Assur. Co. v. Thompson, 217, 223.
 Guckenheimer v. Angevine, 238.
 Guerand v. Dandeleit, 115.
 Guerin v. Stacy, 413.
 Guernsey v. Cook, 302.
 Guild v. Butler, 131, 492.
 v. Hull, 179.
 Guilford School Tp. v. Roberts, 232.

[The figures refer to pages.]

Guillaume v. Rowe, 240, 242.
 Gulf, C. & S. F. R. Co. v. Eddins, 319.
 v. Morris, 289.
 v. Settegast, 88.
 v. Wilbanks, 320.
 Gulick v. Grover, 501, 505.
 Gump v. Halberstadt, 69.
 Gunby v. Sluter, 216.
 Gundlach v. Fischer, 525.
 Gunn v. Cantine, 516.
 Gunnings v. Royal, 125.
 Gunther v. Gunther, 107.
 Gurney v. Howe, 435.
 v. Womersley, 469, 545.
 Guthing v. Lynn, 44.
 Guthman v. Keam, 441.
 Guthrie v. Anderson, 88.
 v. Bashline, 368.
 v. Morris, 160.
 v. Murphy, 157.
 v. Railroad Co., 527.
 Gutta-Percha & R. Mfg. Co. v. Houston, 531, 533.
 Guyman v. Burlingame, 291.
 Guyon v. Lewis, 521.
 Gwinn v. Simes, 269.
 v. Whitaker's Adm'x, 438.
 Gwynne v. Hitchner, 428.

H

Haacke v. Knights of Liberty, 270, 337.
 Haas v. Myers, 27.
 v. Railroad Co., 428.
 Haase v. Nonnemacher, 463, 467.
 Habricht v. Alexander, 147.
 Hackenberry v. Shaw, 272.
 Hacker's Appeal, 52.
 Hackley v. Headley, 244.
 Hadcock v. Osmer, 230.
 Hadley v. Baxendale, 486.
 v. Bordo, 436.
 v. Clarke, 475.
 v. Improvement Co., 221, 222.
 v. Reed, 108.
 Hadlock v. Brooks, 299.
 Haebler v. Myers, 537.
 Haenni v. Bleisch, 54, 225.
 Hagadorn v. Lumber Co., 68.
 Hager v. Catlin, 282.
 Hagerty v. Lee, 375.
 v. Lock Co., 175.
 v. White, 403.
 Haigh v. Brooks, 114, 405.
 Haines v. Lewis, 286.
 v. Tucker, 447.
 Haines' Adm'r v. Tarrant, 158, 236.
 Haldeman v. Insurance Co., 273.
 Hale v. Brown, 179.
 v. Cole, 247.
 v. Cravener, 120.
 v. Gerrish, 167, 168.
 v. Hale, 74, 88, 273.
 v. Rice, 138.
 v. Sheehan, 407.
 v. Spaulding, 381.
 Hales v. Freeman, 534, 535.
 Hall v. Alford, 72.
 v. Bank, 402.
 v. Bishop, 264.
 v. Bryan, 141.
 v. Butterfield, 174.
 v. Corcoran, 269.
 v. Crowley, 412.
 v. Daggett, 273.
 v. Dyson, 258.
 v. Gavitt, 282, 333.
 v. Haggart, 271.
 v. Hall, 54.
 v. Hinks, 238.
 v. Huntoon, 512, 517.
 v. Insurance Co., 368, 441.
 v. Leigh, 383, 415.
 v. McArthur, 470.
 v. Mayor of Swansea, 192.
 v. Railroad Co., 509.
 v. Richardson, 436.
 v. Shultz, 541.
 v. Solomon, 75, 391.
 v. Storrs, 397.
 v. Thayer, 416.
 v. Wallace, 90.
 v. Warren, 180.
 v. White, 505.
 Halladay v. Hess, 395.
 Hallam v. Huffman, 258.
 Halle v. Newbold, 376.
 Hallen v. Runder, 75.
 Hallenbeck v. Kindred, 375.
 Hallett v. Gordon, 382.
 v. Novion, 261.
 Halley v. Troester, 184.
 Hall Mfg. Co. v. Supply Co., 113.
 Hallock v. Insurance Co., 34.
 Halloran v. Whitcomb, 362.
 Halluck v. Bush, 55.
 Halpin v. Insurance Co., 442.

[The figures refer to pages.]

- Halpin v. Stone, 391.
Halsa v. Halsa, 87.
Ham v. Smith, 291.
Hambly v. Railroad Co., 410.
Hamer v. Sidway, 107, 114.
Hamet v. Litcher, 200.
Hamill v. Ashley, 514.
 v. Hall, 96.
Hamilton v. Austin, 268.
 v. Gray, 298.
 v. Hamilton, 304.
 v. Insurance Co., 22, 26, 34, 35, 295.
 v. McPherson, 487.
 v. Park & McKay Co., 201.
 v. Railroad Co., 319.
 v. Rogers, 365.
 v. Thrall, 451.
 v. Watson, 217.
 v. Wood, 480.
Hamlin v. Abell, 230.
 v. Drummond, 69.
 v. Sears, 503.
 v. Stevenson, 150.
Hammer v. Schoenfelder, 487.
Hammond v. Hopping, 141.
 v. Hussey, 111.
 v. Pennock, 238.
 v. Winchester, 28.
Hammons v. State, 267.
Hampden v. Walsh, 275, 276, 339.
Hanauer v. Doane, 330.
Hanchett v. Ives, 125.
 v. Jordan, 269.
 v. Yunker, 517.
Hand v. Marble Co., 361.
 v. Slaney, 156.
Handforth v. Jackson, 237, 307.
Handley v. Heflin, 385.
Handrahan v. O'Regan, 107.
Handy v. Publishing Co., 268, 322, 346.
Haney v. Caldwell, 430.
Hanford v. McNair, 500, 506.
Hankins v. Ottinger, 277.
Hanks v. Barron, 129.
 v. Brown, 275.
 v. Naglee, 300.
Hanna v. Wilcox, 250.
Hannibal H. Chandler & Co. v. Knott, 420.
Hannon v. Hounihan, 73.
Hanover Nat. Bank v. Bank, 341.
 v. Blake, 258.
Hansard v. Robinson, 484.
Hanscom v. Drullard, 228, 230.
Hansell v. Erickson, 462.
Hansen v. Berthelsen, 250.
 v. Gaar, Scott & Co., 125.
 v. Myer, 374.
 v. Rounsavell, 437.
 v. Steam Heating Co., 455.
Hanson v. Armitage, 103.
 v. Crawley, 483.
 v. Marsh, 98, 105.
 v. Nelson, 69.
Hapgood v. Rosenstock, 490.
 v. Shaw, 459.
Happy v. Mosher, 436.
Harbart's Case, 381.
Harbinger, The, 398.
Harbord v. Cooper, 364.
Hard v. Burton, 422.
 v. Seeley, 450.
Harder v. Com'rs, 464.
Hardesty v. Graham, 131.
Harding v. Glucose Co., 308.
 v. Tift, 437.
Hardman v. Booth, 200.
Hardwick v. Insurance Co., 63.
Hardy v. Jones, 337.
 v. Waters, 154.
Hardy Implement Co. v. Iron Works, 364.
Hargan v. Purdy, 264.
Harger v. Worrall, 335.
Hargrove v. Adcock, 85.
Hargroves v. Cooke, 87.
Harker v. Conrad, 437.
Harkreader v. Clayton, 55.
Harlan v. Berry, 383.
Harland v. Lilienthal, 264.
Harlow v. Curtis, 28.
 v. Putnam, 469.
Harman v. Howe, 404.
Harmon v. Bird, 471.
 v. Harmon, 182, 240.
Harmony v. Bingham, 243, 244, 472.
Harms v. McCormick, 358.
Harner v. Dipple, 153.
 v. Killing, 167.
Harney v. Owen, 153.
Harnor v. Groves, 545.
Harper v. Graham, 131.
 v. Harper, 78.
 v. Young, 335.
Harralson v. Stein, 511.
Harran v. Foley, 205.

[The figures refer to pages.]

- Harrell v. Miller, 76.
 Harriman, The, 472.
 v. Emerick, 134.
 v. Harriman, 126, 129.
 Harrington v. Dock Co., 302, 509.
 v. Harrington, 50.
 v. Higgins, 452.
 v. Iron-Works Co., 476, 550.
 Harrington's Adm'r v. Crawford, 283.
 Harris, Ex parte, 25.
 v. Alcock, 222.
 v. Carmody, 245.
 v. Carter, 127.
 v. Cassaday, 124, 126.
 v. Chamberlain, 283.
 v. Frank, 68.
 v. Harper, 65.
 v. Harris' Ex'r, 59.
 v. Heackman, 374.
 v. Nickerson, 42.
 v. Pepperell, 401.
 v. Railroad Co., 20.
 v. Regester, 53.
 v. Rickett, 389.
 v. Roberts, 288.
 v. Roof's Ex'r, 285.
 v. Ross, 162.
 v. Runnels, 260.
 v. Scott, 28.
 v. Sharples, 431.
 v. Smith, 17.
 v. Taylor, 188.
 v. Tyson, 221.
 v. White, 277.
 v. Wicks, 274.
 Harrisburg Bank v. Tyler, 355.
 Harris' Case, 22, 26, 27, 34.
 Harris Co. v. Campbell, 366.
 Harrison v. Adcock, 170.
 v. Baldwin, 343.
 v. Cage, 117.
 v. Close, 129.
 v. Colton, 270.
 v. Fane, 156.
 v. Lodge, 420.
 v. McHenry, 504, 510.
 v. Morrison, 393.
 v. Otley, 184.
 v. Railway Co., 473.
 v. Refining Co., 307.
 Harrison Mach. Works v. Coquillard, 541.
 Harrow Spring Co. v. Harrow Co., 392.
 Harson v. Pike, 38, 39.
 Hart v. Alexander, 423.
 v. Deamer, 182.
 v. Mills, 16, 137, 442.
 v. Prater, 156.
 v. Strong, 130, 244.
 Hartford Bridge Co. v. Ferry Co., 406.
 Hartford Fire Ins. Co. v. Horr, 295.
 v. Railroad Co., 320, 346.
 v. Wilcox, 476.
 Hartford Protection Ins. Co. v. Harmer, 210, 214.
 Hartley v. Decker, 457.
 v. Rice, 136, 276, 303.
 v. Varner, 68.
 Hartley's Appeal, 527.
 Hartman v. Kendall, 169.
 Hartness v. Thompson, 162.
 Hartranft v. Uhlinger, 271.
 Hartung v. Witte, 374, 376.
 Hartupee v. Crawford, 453.
 v. Pittsburg, 16, 453.
 Hartwell v. Hartwell, 283.
 v. Young, 80, 92, 95.
 Hartzell v. Crumb, 394.
 Harvey v. Briggs, 163, 173.
 v. Dale, 469.
 v. Doty, 279.
 v. Duffey, 23, 32.
 v. Facey, 42.
 v. Gibbons, 134.
 v. Harris, 202.
 v. Johnston, 15.
 v. Merrill, 276, 278, 279, 334, 342.
 v. Mount, 249.
 Harwood v. Jones, 70.
 Haseltine v. Smith, 299.
 Haskell v. Tukesbury, 394.
 v. Wright, 376.
 Haskins v. Royster, 350.
 v. Warren, 400.
 Haslack v. Mayers, 453.
 Hassie v. Congregation, 365.
 Hasted v. Dodge, 131.
 Hastelow v. Jackson, 339.
 Hastings v. Dollarhide, 153, 154, 163, 164.
 v. Lovejoy, 425.
 v. Vaughn, 52.
 Hatch v. Douglass, 278.
 v. Hatch's Estate, 168.
 v. McBrien, 99.
 v. Mann, 127, 136, 257.
 v. Taylor, 513, 514.

[The figures refer to pages.]

- Hatchett v. Baddeley, 189.
 Hathaway v. Hagan, 271.
 v. Moran, 346.
 Hatsall v. Griffith, 382.
 Hatzfield v. Gulden, 286.
 Haubert v. Mausshardt, 422.
 Hauser v. Harding, 45.
 Hausmann v. Burnham, 80.
 Havanna Press-Drill Co. v. Ashurst, 129.
 Haven v. Foster, 207.
 v. Neal, 235.
 v. Russell, 432.
 Havens v. Havens, 18.
 Haviland v. Halstead, 304.
 v. Sammis, 74.
 v. Willets, 226.
 Hawk v. Brownell, 227.
 Hawes v. Smith, 107, 401.
 Hawken v. Bourne, 499.
 Hawkes v. Saunders, 180.
 Hawkeye Ins. Co. v. Brainard, 284.
 Hawkins v. Ball's Adm'r, 477.
 v. Graham, 432, 433.
 v. Lange, 505.
 v. McGroarty, 506.
 Hawkinson v. Harmon, 22.
 Hawks v. Weaver, 273.
 Hawley v. Beverley, 534.
 v. Bristol, 365.
 v. Keeler, 448.
 v. Moody, 92, 553.
 Haworth v. Montgomery, 264.
 v. Norris, 391.
 Haws v. Tiernan, 494.
 Hay v. Green, 362.
 Hayden v. Souger, 38, 39.
 Haydock v. Haydock's Ex'rs, 250.
 Hayes v. Crane, 519.
 v. Fine, 76.
 v. Gross, 473.
 v. Insurance Co., 129.
 v. Jackson, 87.
 v. O'Brien, 33.
 Hayner v. Churchill, 514.
 Haynes v. Baptist Church, 473.
 v. Bennett, 170.
 v. Dorman, 324.
 v. Mason, 79.
 v. Nice, 437.
 v. Rudd, 323, 337, 540.
 Hayney v. Coyne, 298.
 Hays v. McClurg, 436.
 Hayward v. Andrews, 364.
 v. Barker, 141, 188.
 v. Leonard, 431, 550.
 v. Mfg. Co., 285.
 Hazard v. Day, 267.
 v. Insurance Co., 202, 542.
 v. Irwin, 60.
 v. Loring, 441.
 Hazelrigg v. Donaldson, 243.
 Hazlett v. Sinclair, 376.
 Head v. Ligon, 33.
 v. Insurance Co., 192.
 v. Tattersall, 428.
 Headley v. Shaw, 452.
 Heady v. Boden, 141.
 Heany v. Schwartz, 496.
 Heaps v. Dunham, 242.
 Heard v. Pulaski, 437, 440.
 Hearn, In re, 152.
 v. Cullen, 349, 533.
 Heath v. Blake, 483.
 v. Hall, 361.
 v. Heath, 78.
 v. Nutter, 500, 506.
 v. Stevens, 174.
 v. West, 171.
 Heaton v. Angier, 422.
 v. Dennis, 297, 300.
 v. Eldridge, 97.
 v. Norman Co.'s Bank, 245.
 v. Norton Co., 243.
 Heaver v. Lanahan, 446.
 Hebb's Case, 22.
 Hecht v. Batcheller, 203.
 v. Caughron, 356.
 Heckman v. Swartz, 540.
 Hedden v. Griffin, 524.
 v. Roberts, 379.
 Hedges v. Wallace, 330.
 Hedin v. Institute, 227.
 Heermans v. Ellsworth, 368.
 Heffelfinger v. Hummel, 122.
 Heffron v. Armsby, 90.
 Hefner v. Vandolah, 504.
 Hefter v. Cahn, 257.
 Hegler v. Faulkner, 166.
 Heilbutt v. Hickson, 463.
 Heirn v. Carron, 492.
 Heist v. Blaisdell, 272.
 Hellams v. Abercrombie, 267.
 Helms v. Crane, 126.
 v. Franciscus, 303.
 Helt v. Smith, 71.

[The figures refer to pages.]

- Hemingway v. Stansell, 492.
 Hemmenway v. Stone, 384, 415.
 Hemmer v. Cooper, 227.
 Hendee v. Pinkerton, 52, 53.
 Henderson v. Cass Co., 442.
 v. Coke Co., 24, 45.
 v. Fox, 160.
 v. Gibbs, 239.
 v. Hammond, 380.
 v. Henshall, 378.
 v. McGregor, 179, 180.
 v. Palmer, 293.
 v. Perkins, 86.
 v. Railway Co., 367.
 v. Stevenson, 20.
 Henderson Bridge Co. v. McGrath, 40, 44.
 Hendrick v. Lindsay, 356.
 Hendricks v. Goodrich, 537.
 v. Rasson, 54.
 Hendy v. Kier, 110.
 Henequin v. Naylor, 222.
 Henkel v. Pape, 204.
 Hennersdorf v. State, 268.
 Hennessy v. Woolworth, 490.
 Hennessy v. Bacon, 122.
 v. Metzger, 412.
 Henninger v. Heald, 238.
 Hennington v. State, 266.
 Henricus v. Englert, 521.
 Henry v. Bishop, 389.
 v. Coats, 481.
 v. Flagg, 273.
 v. Heeb, 505.
 v. Henry, 72.
 v. Root, 150, 153, 168.
 v. Sansom, 274.
 v. Wells, 92.
 Henry Bill Pub. Co. v. Utley, 437.
 Hensel v. Ass'n, 271.
 Henthorn v. Fraser, 26.
 v. Frazer, 34, 35.
 Hentz v. Jewell, 280.
 v. Miller, 200.
 Henzler's Estate v. Bossard, 18.
 Herbert v. Turball, 150.
 Herostreit v. Beckwith, 367.
 Herendeen Mfg. Co. v. Moore, 68.
 Hernan v. Jenchner, 339.
 Hernandez v. Insurance Co., 407.
 Herreshoff v. Boutineau, 307, 309.
 v. Misch, 426.
 Herrick v. Newell, 95.
 Herriman v. Menzies, 317.
 Herring v. Dorell, 124.
 v. Scaggs, 505.
 Hersey v. Bennett, 439.
 Hershey v. Luce, 407.
 Hertzler v. Geigley, 337.
 Hertzog v. Hertzog, 530.
 Herzog v. Heyman, 469.
 v. Sawyer, 425.
 Hess v. Griggs, 389.
 Hess' Estate, In re, 53, 111.
 Hessick v. Hessick, 250.
 Hewes v. Bayley, 382.
 Hewett v. Currier, 125.
 v. Dement, 274.
 v. Jones, 198.
 Hewitt v. Anderson, 40.
 v. Lumber Co., 396.
 Heyman v. Dooley, 110.
 Heysham v. Dettre, 75.
 Heyward v. Lomax, 438.
 Heywood v. Perrin, 75, 403.
 v. Tillson, 350.
 Heyworth v. Knight, 43.
 Hibbard v. McKindley, 404.
 v. Peek, 398.
 Hibbert v. Aylott's Heirs, 94.
 Hibbette v. Baines, 305.
 Hickey v. O'Brien, 45, 120.
 v. Stewart, 494.
 Hickman v. Hall's Adm'rs, 158.
 v. Haynes, 421, 426.
 v. Shimp, 428.
 Hicks v. Aylesworth, 462.
 v. Burhans, 138.
 v. Cram, 380.
 v. Stevens, 227, 233, 390.
 Hieronymus v. Ass'n, 346.
 Higert v. Asbury University, 118.
 Higgen's Case, 478.
 Higgins, In re, 152.
 v. Dale, 141.
 v. Hallock, 68.
 v. Hill, 117.
 v. Lessig, 40, 41.
 v. Murray, 100.
 v. Pitt, 258.
 v. Railroad Co., 455.
 v. Senior, 85, 90, 394.
 Highberger v. Stiffler, 248.
 Highstone v. Burdette, 393.
 Hilborn v. Bucknam, 243.
 Hilderbrand v. Fine Arts Co., 462.

[The figures refer to pages.]

- Hill v. Anderson, 175.
 v. Baker, 147.
 v. Blake, 65, 426.
 v. Buckley, 204.
 v. Duluth, 407.
 v. Dunham, 269.
 v. Evans, 397.
 v. Freeman, 337.
 v. Hill, 18.
 v. Hooper, 79.
 v. Jamieson, 79.
 v. Kidd, 276.
 v. McNichol, 54.
 v. McPherson, 369.
 v. Mfg. Co., 406.
 v. Miller, 249.
 v. Morse, 50.
 v. Nelms, 169.
 v. Robbins, 439.
 v. Spear, 330.
 v. Whidden, 391.
 Hills v. Ludwig, 74.
 v. Street, 540.
 v. Sughrue, 202.
 Hilton v. Burley, 439.
 v. Eckersley, 318.
 v. Houghton, 269.
 v. Shepherd, 168.
 v. Woods, 300.
 Himrod Furnace Co. v. Railroad Co., 84.
 Hinchman v. Lincoln, 102.
 v. Weeks, 100, 231, 237.
 Hinckley v. Steel Co., 449, 468.
 Hind v. Holdship, 113.
 Hindmarch v. Hoffman, 539, 541.
 Hindrey v. Williams, 473.
 Hines v. Board, 241.
 Hingston v. L. P. & J. A. Smith Co., 228.
 Hinkley v. Fowler, 358.
 Hinton v. Locke, 397.
 Hirth v. Graham, 76.
 Hissong v. Railroad Co., 319.
 Hitchcock v. Coker, 310.
 Hittson v. Brown, 264.
 Hoadley v. McLain, 105.
 v. McLaine, 105, 137.
 Hoag v. Graves, 511.
 Hoagland v. State, 145.
 Hoare v. Rennie, 454, 455.
 Hobbs v. Brick Co., 419.
 v. McLean, 405.
 v. Whip Co., 16.
 Hobough v. Murphy, 141, 142.
 Hochmark v. Richler, 273.
 Hochster v. De la Tour, 444, 445.
 Hodge v. Sloan, 307, 376.
 Hodges v. Kowing, 89.
 v. Nalty, 119, 268.
 v. Sublett, 21, 43.
 v. Temple, 330.
 Hodson v. Terrill, 339.
 Hoe v. Sanborn, 224, 463.
 Hofflin v. Moss, 302.
 Hoffman v. Coombs, 126.
 v. Insurance Co., 403, 406.
 v. Noble, 238.
 v. Vallejo, 297.
 Hogan v. Curtin, 303.
 v. Kyle, 495.
 v. Moore, 246.
 v. Stophlet, 127.
 Hogenkamp v. Ackerman, 424.
 Hogg v. Laster, 18.
 Holbrook v. Burt, 369, 370.
 v. Connor, 227.
 v. Wright, 516.
 Holcomb v. Weaver, 302.
 Holden v. Cosgrove, 333.
 v. Curry, 154.
 v. Hardy, 260.
 v. O'Brien, 266.
 v. Pike, 174.
 Holfenstein's Estate, 37.
 Holladay v. Patterson, 288.
 Holler v. Richards, 83.
 Holley v. Anness, 489.
 Hollins v. Fowler, 130, 200.
 Hollis v. Burgess, 83, 86, 88.
 v. Edwards, 81.
 v. Francois, 188, 190.
 v. Pond, 53.
 Hollister v. Abbott, 50.
 v. Stewart, 493.
 Holloway v. Jacoby, 467.
 v. Lowe, 298.
 v. McNear, 400.
 Holloway's Assignee v. Rudy, 141.
 Holman v. Johnson, 337, 345, 546.
 Holmden v. Janes, 94.
 Holmes v. Bank, 271.
 v. Bell, 478.
 v. Blogg, 174, 257.
 v. Boyd, 126.
 v. Gregg, 442.
 v. Halde, 264.
 v. Hall, 402.

[The figures refer to pages.]

- Holmes v. Hill, 242.
 v. Insurance Co., 405.
 v. McDonald, 54.
 v. Rice, 150, 162.
 v. Richet, 295.
 v. Trumper, 479, 481.
 v. Williamson, 534.
 Holmes & Griggs Mfg. Co. v. Metal Co., 193.
 Holst v. Stewart, 227, 228, 229.
 Holston Salt & Plaster Co. v. Campbell, 407.
 Holt v. Ely, 539.
 v. Kirby, 274.
 v. O'Brien, 324.
 v. Pie, 393.
 v. Ross, 521.
 v. Ward Clarendieux, 117, 154, 162, 163.
 v. Ward Clemencieux, 118.
 Holtz v. Noble, 225.
 Holtz v. Schmidt, 542.
 Home Nat. Bank v. Waterman, 528.
 Homer v. Perkins, 225.
 v. Shaw, 462.
 v. Thwing, 177.
 v. Wallis, 482.
 Honck v. Muller, 454.
 Honeyman v. Jarvis, 123.
 v. Marryat, 28.
 Hood v. Exploration Co., 468.
 v. Hartshorn, 295.
 v. Todd, 203.
 Hooker v. Knab, 342.
 Hooper v. Hooper, 70, 99, 407.
 v. Brundage, 369.
 v. Edwards, 267.
 v. Payne, 162.
 Hooper's Case, 478.
 Hoover v. Sidener, 464.
 Hopewell v. McGrew, 407.
 Hopkins v. Mollinieus, 497.
 v. Stefan, 270.
 v. U. S., 313.
 Hopper v. Ludlum, 149.
 Hopson v. Boyd, 182.
 Horn v. Bank, 479.
 v. Luddington, 93.
 v. Miller, 375.
 Hornby v. Close, 317.
 Horne v. Niver, 30.
 v. Railway, 487.
 Horner v. Frazier, 74, 80.
 v. Graves, 307.
 Horner v. Horner, 393.
 Horsfall v. Thomas, 233.
 Horst v. Wagner, 482.
 Horton v. Bauer, 486.
 v. Bloedorn, 240, 241.
 v. Lee, 227.
 v. McCarty, 90.
 v. Riely, 535.
 v. Rohlf, 405.
 Hosford v. Kanouse, 355.
 Hoshor v. Kautz, 114.
 Hoskinson v. Elliott, 381.
 Hosler v. Hursh, 491.
 Hosmer v. McDonald, 407.
 v. Wilson, 444, 447.
 Hostetter v. Hollinger, 355.
 v. Park, 399.
 Hotchkin v. Bank, 222.
 Hough v. Brown, 28.
 v. Kugler, 414.
 v. Rawson, 459.
 Hough's Adm'r v. Hunt, 252.
 Houghtaling v. Ball, 97, 105.
 Houghton v. Francis, 481.
 v. Houghton, 248.
 Houghwout v. Boisaubin, 15, 31, 35.
 Houldsworth v. Glasgow Bank, 235.
 Houlton v. Dunn, 285.
 v. Nichol, 286.
 Housding v. Solomon, 432.
 House v. Alexander, 156, 158, 168.
 v. McKenney, 339.
 v. Waterworks Co., 352.
 Household Ins. Co. v. Grant, 26, 27.
 Housekeeper Pub. Co. v. Swift, 421.
 Houser v. Lamont, 96.
 v. McGinnas, 534.
 Houston v. Sledge, 426.
 Houston & T. C. R. Co. v. McCarty, 203.
 Hovey v. Brown, 505.
 v. Chase, 180.
 v. Hobson, 180, 182, 183, 185, 186.
 v. Page, 378.
 v. Storer, 286.
 How v. Kemball, 87.
 Howard v. Daly, 26, 30, 444, 485, 526.
 v. Gould, 223.
 v. Independent Church, 291.
 v. Industrial School, 42.
 v. McCall, 437.
 v. Mfg. Co., 488.
 v. Railroad Co., 420, 421.
 v. Simpkins, 156.

[The figures refer to pages.]

- Howard v. Walker, 399.
 v. Whitt, 65.
 Howard Ins. Co. v. Owen's Adm'r, 63.
 Howe v. Batchelder, 76.
 v. Hayward, 104.
 v. Litchfield, 333.
 v. North, 17.
 v. O'Malley, 117.
 v. Railroad Co., 508.
 v. Smith, 104.
 v. Taggart, 123.
 v. Wildes, 188.
 Howell v. Coupland, 476.
 v. Graff, 514.
 v. Kelly, 75.
 v. Stewart, 330, 331.
 Howe Mach. Co. v. Bryson, 488.
 v. Simler, 526.
 Howes v. Barker, 478.
 Howe Sewing Mach. Co. v. Rosen-
 steel, 477.
 Howland v. Coffin, 374.
 v. Lounds, 40.
 Howley v. Whipple, 204.
 Howson v. Hancock, 338.
 Hoxsie v. Lumber Co., 491.
 Hoyle, *In re*, 83.
 Hoyt v. Byrnes, 441.
 v. Casey, 155, 157.
 v. Wilkinson, 164, 165, 175
 Hoyt Mfg. Co. v. Turner, 237.
 Hubbard v. Bank, 441.
 v. Belden, 476, 550.
 v. Coolidge, 111.
 v. Cummings, 168, 171.
 v. Freiburger, 275.
 v. Greeley, 56.
 v. Martin, 207, 544.
 v. Miller, 115, 307, 324.
 v. Moore, 329.
 v. Rowell, 488.
 v. Ten Brook, 514, 521.
 v. Weare, 231, 232.
 Hubbell v. Flint, 329.
 v. Palmer, 28.
 Huber v. Guggenheim, 225.
 v. Johnson, 298, 299.
 v. Zimmerman, 513.
 Huck v. Flentye, 15.
 Huckestein v. Kelly, 421.
 Huckins v. Hunt, 257.
 Hudson v. Hudson, 17.
 v. McCartney, 295.
 v. Revett, 56.
 Hudson v. Weir, 100.
 Huff v. Logan, 132.
 v. Watkins, 350.
 Huffman v. Hughlett, 539.
 v. Wyrick, 18.
 Huggins v. People, 245.
 Hughes v. Boone, 346.
 v. Fisher, 69.
 v. Griswold, 273.
 v. Gross, 476.
 v. Mfg. Co., 227.
 v. Nolte, 488.
 v. Wamsutta Mills, 475.
 v. Watson, 170.
 Hugo, The, 319.
 Hugnennin v. Baseley, 249.
 Hull v. Johnson, 493.
 v. Louth, 185, 186.
 v. Pitrat, 490.
 Hull's Assignees v. Connolly, 157.
 Hull Coal & Coke Co. v. Coke Co.,
 404, 410, 456.
 Hulme v. Tenant, 190.
 Hulse v. Machine Co., 312.
 v. Young, 515.
 Humbert v. Brisbane, 86, 93.
 Humble v. Hunter, 199, 360, 522.
 v. Mitchell, 100.
 Hume v. U. S., 206.
 Humphrey v. Merriam, 229, 230, 232.
 Humphreys v. Railroad Co., 392.
 Hunkins v. Hunkins, 94.
 Hunt v. Bate, 137.
 v. Brown, 491.
 v. Douglass, 511.
 v. Gray, 482, 483.
 v. Hecht, 103.
 v. Higman, 26.
 v. Hunt, 303.
 v. Jones, 97.
 v. Knickerbacker, 261.
 v. Lipp, 93.
 v. Livermore, 403.
 v. Mann, 362.
 v. Peake, 151, 154, 163.
 v. Rabitoay, 185.
 v. Rousmanier, 206, 527-529.
 v. Shackelford, 369.
 v. Silk, 545.
 Hunter v. Anthony, 405.
 v. Giddings, 522.
 v. Mills, 94.
 v. Nolf, 283.
 v. Parker, 506.

[The figures refer to pages.]

- Hunter v. Tolbard, 186.
 v. Walters, 197.
 v. Warner, 442.
 v. Wetsell, 104.
 Hunter's Adm'rs v. Miller's Ex'rs, 403.
 Hunting v. Downer, 469.
 v. Emmart, 367.
 Huntington v. Knox, 200.
 Huntley v. Mathias, 513.
 Hurd v. Bovee, 395.
 v. Dunsmore, 487.
 v. Hall, 469.
 Hurley v. Schring, 426.
 Hurlock v. Smith, 420.
 Hurst v. Litchfield, 295.
 Hurt v. Ford, 70, 97.
 Huscombe v. Standing, 245.
 Hussey v. Horne-Payne, 28.
 v. Jewett, 163.
 v. Kirkman, 496.
 Husted v. Craig, 464.
 Hustis v. Pickards, 264.
 Hutchen v. Gibson, 286.
 Hutchins v. Hebbard, 58, 527.
 Hutchinson v. Bowers, 515.
 v. Heyworth, 367.
 v. Hutchinson, 78.
 Hutley v. Hutley, 292, 297-299.
 Hutton v. Warren, 396.
 Hutton Bros. v. Gordon, 72.
 Hutzler v. Lord, 534.
 Huyett & Smith Mfg. Co. v. Chicago
 Edison Co., 473.
 Hyatt v. Clark, 505, 506.
 Hyde v. Wrench, 28, 29, 36, 37
 Hydeville Co. v. Slate Co., 425.
 Hyer v. Hyatt, 160, 290.
 v. Traction Co., 290.
 Hynds v. Hays, 322.
 Hypes v. Griffin, 85, 520.
 Hysell v. Mfg. Co., 473.
- !
- Ide v. Stanton, 85.
 Ihley v. Padgett, 166.
 Ilderton v. Ilderton, 344.
 Illinois v. Railroad Co., 440.
 Illinois Cent. R. Co. v. Cabinet Co.,
 412.
 v. Cobb, 487.
 Illinois Land & Loan Co. v. Bonner,
 163.
 Illinois Land & Loan Co. v. Speyer, 299.
 Illinois Masons' Benevolent Soc. v.
 Baldwin, 398.
 Ilsley v. Jewett, 141.
 Imperial Land Co. of Marseilles, In
 re, 25.
 Imperial Loan Co. v. Stone, 37, 184.
 Indiana Mfg. Co. v. Hayes, 16.
 Indianapolis Cabinet Co. v. Herr-
 mann, 45.
 Indianapolis, D. & S. R. Co. v. Er-
 vin, 289.
 Indianapolis, D. & W. R. Co. v. For-
 sythe, 319.
 Indianapolis, P. & C. R. Co. v. Tyng,
 229.
 Indianapolis Water Co. v. Nulte, 375.
 Ingersoll v. Martin, 130, 491.
 Inglebright v. Hammond, 399.
 Ingraham v. Baldwin, 181, 183.
 Ingram v. Ingram, 356.
 Inhabitants of Bernards Tp. v. Steb-
 bens, 52.
 Inhabitants of Garland v. Reynolds,
 516.
 Inhabitants of Industry v. Starks,
 297.
 Inhabitants of Middlefield v. Knitting
 Co., 375.
 Inhabitants of Town of Montville v.
 Haughton, 52.
 Inhabitants of Township of Borden-
 town v. Wallace, 245.
 Inhabitants of West Cambridge v. In-
 habitants of Lexington, 344.
 International Bldg. & Loan Ass'n v.
 Abbott, 271.
 International G. N. R. Co. v. Daw-
 son, 288.
 Inter-Ocean Pub. Co. v. Associated
 Press, 315.
 Ionides v. Insurance Co., 202.
 v. Pender, 214.
 Iowa Savings & Loan Ass'n v. Heidt,
 271, 274.
 Iredell v. Barbee, 404.
 Ireland v. Geraghty, 54.
 Iron City Tool Works v. Long, 534.
 Iron Works v. Douglas, 36.
 Irvine v. Irvine, 153, 164, 169.
 v. McKeon, 58.
 v. Watson, 521, 523.
 Irvine's Heirs v. Crockett, 163.

[The figures refer to pages.]

Irwin v. Lombard University, 118,
119.
v. University, 118.
v. Williar, 276, 278-280, 342, 398.
v. Wilson, 203.
Isham v. Post, 111.
Isherwood v. Whitmore, 442.
Isom v. Johns, 537.
Iverson v. Cirkel, 97.
Ives v. Bosley, 126.
v. Carter, 227.
v. Hazard, 89.
v. Jones, 259, 327.
v. Tregent, 22.
Ivory v. Michael, 481.

J

Jack v. Davis, 369.
Jackson v. Badger, 505.
v. Bank, 331.
v. Burke, 438.
v. Cassidy, 271.
v. Collins, 227, 228.
v. Duchaire, 257.
v. Emmens, 514.
v. Gager, 389.
v. Gardner, 406.
v. Hodges, 236.
v. Hough, 537.
v. Insurance Co., 466.
v. Jackson, 344.
v. Johnson, 483.
v. McLean, 337.
v. May, 274.
v. Murray, 534.
v. Myers, 95.
v. Parkhurst, 57.
v. Sheldon, 389.
v. Stackhouse, 403, 491.
v. Travis, 271.
v. Tupper, 104.
v. Vanderheyden, 188.
Jackson Ins. Co. v. Partee, 528.
Jackson Iron Co. v. Concentrating Co.,
80.
Jackson Steel Nail Co. v. Marks, 280.
Jacksonville M. P. Ry. & Nav. Co. v.
Hooper, 53, 472.
Jacobs, In re 260.
v. Moseley, 74.
v. Railroad Co., 94.
v. Tobiason, 291.

Jacquinet v. Boutron, 474.
Jaeger's Sanitary Woolen Supply Co
v. Walker, 364.
Jaffray v. Davis, 129, 131.
Jaffrey v. Brown, 222.
James v. Adams, 444, 447.
v. Allen Co., 526.
v. Darby, 28.
v. Jellison, 303, 323.
v. M'Credie, 515.
v. Mayrant, 191.
v. Morey, 65.
v. Morgan, 134.
v. Newton, 366.
v. Patten, 89.
v. Roberts, 241.
v. Steere, 217.
James' Estate, In re, 110.
Jameson v. Carpenter, 337.
Jamieson v. Wallace, 278, 342.
Jamison v. Culligan, 184.
v. Dimock, 94.
Janin v. Brown, 477.
Janis v. Roentgen, 293.
Janney v. Boyd, 398.
Jansen v. Williams, 508, 510.
Janvrin v. Exeter, 38.
Jaqua v. Headington, 413.
Jaques v. Methodist Church, 190.
Jaquith v. Hudson, 413.
Jarvis v. Peck, 312.
Jeane v. Grand Lodge, 296.
Jefferson v. Asch, 357.
v. Church of St. Matthew, 437,
438.
Jefferson Co. Bldg. Ass'n v. Heil, 54.
Jeffery v. Underwood, 52.
v. Walker, 95.
Jefferys v. Gurr, 92.
Jefford v. Ringgold, 163.
Jeffrey v. Bigelow, 224, 514, 523.
Jeffries v. Ferguson, 385.
Jefts v. York, 517.
Jell v. Douglas, 382.
Jellett v. Rhode, 81.
Jenkins v. Atkins, 528.
v. Bradford, 298.
v. Frink, 259.
v. Hall, 303.
v. Hutchinson, 517.
v. Long, 429.
v. Pye, 248, 251, 252.
v. Trager, 74.

[The figures refer to pages.]

- Jenks v. Fritz, 208.
 Jenners v. Howard, 180.
 Jenness v. Iron Co., 36.
 v. Lane, 126, 131.
 v. Parker, 470.
 Jennings v. Chase, 126.
 v. Lyons, 476, 550.
 v. McConnell, 248, 249.
 v. Rundall, 176, 177.
 Jerome v. Bigelow, 257.
 Jervis v. Berridge, 393.
 Jessel v. Insurance Co., 363.
 Jett v. Hempstead, 508.
 Jewett v. Black, 409.
 v. Smith, 378.
 Jewett Pub. Co. v. Butler, 259.
 J. G. Wagner Co. v. Cawker, 412.
 J. I. Case Threshing Mach. Co. v. Smith, 89.
 Jilson v. Gilbert, 77.
 Joannin v. Ogilvie, 540.
 Joest v. Williams, 187.
 John v. John, 114.
 John Pritzlaff Hardware Co. v. Berghoefer, 460.
 Johns v. Fritchey, 186.
 v. Wilson, 354.
 Johnson v. Chadwell, 179.
 v. Cummins, 190, 191.
 v. Cunningham, 511.
 v. Dodgson, 83.
 v. Fall, 276.
 v. Farley, 53.
 v. Gallagher, 190.
 v. Harvey, 534.
 v. Heagan, 480.
 v. Hubbell, 218.
 v. Hulings, 264.
 v. Hurley, 502.
 v. Insurance Co., 172, 174.
 v. Jacobs, 23.
 v. Lines, 156, 157, 159.
 v. McLane, 236.
 v. Moore, 479.
 v. Packet Co., 533, 534.
 v. People, 267.
 v. Pie, 177.
 v. Seymour, 225, 234.
 v. Smock, 441.
 v. Stoddard, 398.
 v. Stone, 501.
 v. Storie, 166.
 v. Travis, 488.
 v. Wallower, 224.
 Johnson v. Wilkinson, 76.
 v. Youngs, 526.
 Johnson's Adm'r v. Hunt, 303, 492.
 v. Railroad Co., 20, 34, 319.
 v. Seller's Adm'r, 129.
 Johnson's Ex'x v. Jennings' Adm'r, 542, 545.
 Johnston v. Bowersock, 78.
 v. Dahlgren, 264.
 v. Dickson, 335.
 v. Insurance Co., 369.
 v. Jones, 91.
 v. McConnell, 264.
 v. Miller, 278.
 v. Oliver, 58.
 v. Patterson, 199.
 v. Russell, 276.
 v. Trask, 99, 426.
 v. Trippe, 120.
 v. Wadsworth, 87, 489.
 Johnstone v. Mappin, 73.
 v. Milling, 446.
 Johnston Harvester Co. v. McLean, 480, 483.
 John V. Farwell Co. v. Hilton, 238.
 Joice v. Taylor, 218.
 Jonassohn v. Young, 454.
 Jones v. Anderson, 397.
 v. Bacon, 70.
 v. Bank, 154, 331.
 v. Benedict, 438.
 v. Blocker, 350.
 v. Brewer, 152.
 v. Brown, 295.
 v. Christian, 238.
 v. Colvin, 157.
 v. Daniel, 28.
 v. Dannenberg Co., 294.
 v. Davis, 89.
 v. Degge, 116.
 v. Dow, 84.
 v. Edney, 216.
 v. Flint, 76.
 v. George, 463.
 v. Grantham, 426.
 v. Hake, 272.
 v. Harris, 526.
 v. Hart, 516.
 v. Hoar, 549.
 v. Johnson, 478.
 v. Judd, 474, 550.
 v. Just, 463.
 v. Lloyd, 248, 249.
 v. Perkins, 131, 191, 266, 492, 704.

[The figures refer to pages.]

Jones v. Pouch, 77.
 v. Randall, 345.
 v. Reynolds, 101.
 v. Risley, 128.
 v. Rittenhouse, 122.
 v. Ryde, 469, 545.
 v. Shale, 279.
 v. Stanly, 350.
 v. Thomas, 356.
 v. Turner, 244, 245.
 v. Tye, 86.
 v. U. S., 217, 410, 439, 462, 472, 473.
 v. Williams, 50, 437.
 v. Wilson, 130.
 Jones Adm'r v. Perkins, 180.
 Jones & Hotchkiss Co. v. Davenport, 431.
 Jordan v. Coffield, 156.
 v. Davis, 54.
 v. Dayton, 264.
 v. Miller, 78.
 v. Norton, 28.
 v. Osgood, 222.
 v. Parker, 239.
 v. Thornton, 371.
 Josling v. Kingsford, 463.
 Joslyn v. Parlin, 364.
 Joy v. St. Louis, 403, 405.
 Judd v. Harrington, 313.
 v. Weber, 232.
 Judkins v. Walker, 175.
 Judson v. Corcoran, 370.
 Judy v. Louderman, 114.
 Juilliard v. Chaffee, 392.
 Jump v. Johnson, 346.
 Junkans v. Bergin, 50.
 Justice v. Lang, 89, 105.
 Juzan v. Toulmin, 221.

K

Kadish v. Young, 444, 446.
 Kafes v. McPherson, 367.
 Kagel v. Totten, 198.
 Kahn v. Walton, 280, 342.
 Kalmbach v. Foote, 537.
 Kamena v. Huelbig, 369, 370.
 Kane v. Hood, 452.
 Kansas City, M. & B. R. v. Robertson, 366.
 Kant v. Rice, 295.
 Kantrowitz v. Prather, 190.
 Katz v. Bedford, 431.
 Katz v. Moessinger, 141.
 Kauffman v. Raeder, 450.
 Kaufman v. Bank, 356.
 v. Mfg. Co., 45.
 Kayton v. Barnett, 519.
 Keadle v. Siddens, 69.
 Kean v. Davis, 520.
 Keane v. Boycott, 150, 162.
 Kearley v. Thomson, 338.
 Kearney v. Taylor, 259.
 Kearon v. Pearson, 472.
 Keasley v. Thomson, 339.
 Keates v. Lord Cadogan, 221.
 Keating v. Price, 216, 218.
 Keeble v. Cummins, 179.
 v. Keeble, 412.
 Keedy v. Long, 430.
 v. Moats, 55.
 Keefer v. Zimmerman, 478.
 Keeler v. Clifford, 433.
 v. Herr, 431.
 v. Taylor, 307.
 Keen v. Beckman, 59, 394.
 Keene v. Sage, 355.
 v. Weeks, 483.
 Keener v. Crull, 141.
 Keenholts v. Church, 542.
 Keep v. Goodrich, 118, 119.
 Keesling v. Frazier, 70.
 Keffer v. Grayson, 60, 126.
 Kehoe v. Patton, 357.
 Keidan v. Winegar, 520.
 Keighler v. Mfg. Co., 510.
 Keighley v. Watson, 415.
 Keightley v. Watson, 383.
 Kein v. Tupper, 16.
 Keir v. Leeman, 293.
 Keiser v. Decker, 273.
 Keith v. Goodwin, 481.
 v. Miles, 128.
 v. Optical Co., 307.
 Keller v. Ashford, 354, 358.
 v. Holderman, 41.
 v. Orr, 229.
 v. Ybarru, 42, 45.
 Kelley v. Caplice, 252.
 v. Davis, 159, 548.
 v. Insurance Co., 134.
 v. Railroad Co., 505, 508.
 Kellogg v. Krauser, 368.
 v. Olmstead, 126.
 v. Richards, 131.
 v. Robinson, 375.
 Kellogg Bridge Co. v. Hamilton, 463.

[The figures refer to pages.]

- Kelly, In re, 39.
 v. Bliss, 419.
 v. Bradford, 432.
 v. Roberts, 357.
 v. Solari, 208, 543.
 Kelner v. Baxter, 504.
 Kelsea v. Mfg. Co., 23.
 Kelsey v. Hobby, 242.
 Kemble v. Farren, 412, 414.
 Kemmitt v. Adamson, 274.
 Kemp v. Fender, 534.
 v. Humphrey, 409.
 v. Pryor, 499.
 v. Walker, 54.
 Kempner v. Cohn, 26, 31, 34.
 Kemp's Ex'r v. McPherson, 369.
 Kendall v. Hamilton, 380.
 v. May, 181.
 v. West, 428.
 v. Wilson, 228.
 Kendrick v. Niesz, 141, 151, 167-169.
 Kennebec Co. v. Augusta Ins. & B. Co., 393.
 Kennedy v. Baker, 169.
 v. Brown, 139.
 v. Ehlen, 90, 500.
 v. Insurance Co., 537.
 v. Owen, 376.
 v. Panama, etc., Co., 218.
 v. Poor, 460.
 v. Roberts, 241.
 Kennemore v. Kennemore, 95.
 Kenner v. Harding, 222.
 Kennerty v. Etiwan Co., 197.
 Kensington, The, 345.
 Kent v. Bornstein, 516.
 v. Carcaud, 218.
 v. Kent, 77, 78.
 v. Rand, 141.
 Kentucky v. Bassford, 344.
 Kenyon v. Ass'n, 435.
 Kepner v. Keefer, 266.
 Keppell v. Bailey, 376.
 Kerfoot v. Hyman, 510.
 Kerkhof v. Paper Co., 104.
 Kerns v. Hagenbuchle, 304.
 Kerr v. Brunton, 297.
 v. Hill, 76.
 Kershaw v. Kelsey, 147.
 Kerwin v. Doran, 343.
 Kessler v. Smith, 105.
 Kessler's Estate, In re, 74.
 Ketchum v. Catlin, 201.
 v. Evertson, 552.
 Kettle R. R. Co. v. Railway Co., 373, 377, 546.
 Keuka College v. Ray, 118, 119.
 Keyes v. Allen, 69.
 Kidder v. Blake, 323.
 v. Kidder, 419, 491.
 v. Norris, 437.
 Kidney v. Persons, 538.
 v. Stoddard, 222.
 Kiersted v. Railroad Co., 521.
 Kiewert v. Rindskopf, 538, 539.
 Kihlberg v. U. S., 460.
 Kilcrease v. Johnson, 345.
 Kilgore v. Rich, 156, 158.
 KilKelly v. Martin, 479, 481.
 Killmore v. Howlett, 76.
 Kilmer v. Smith, 208.
 Kimball, The, 436.
 v. Bangs, 227.
 v. Cuddy, 179.
 v. Morton, 489.
 v. Noyes, 358.
 Kimball & Austin Mfg. Co. v. Vroman, 428.
 Kimbrough v. Lukins, 273.
 Kime v. Brooks, 500.
 Kimmell v. Skelly, 229.
 Kincaid v. School Dist., 441.
 Kindig v. March, 527.
 Kine v. Turner, 290.
 King v. Bushnell, 96.
 v. Cummings, 179.
 v. Doolittle, 200.
 v. Duluth, 460.
 v. Faist, 420.
 v. Finch, 411.
 v. Fleming, 269.
 v. Gillett, 419.
 v. Hoare, 380, 415.
 v. Holbrook, 401.
 v. Kaiser, 74.
 v. Kersey, 448.
 v. King, 303, 323, 324.
 v. Mackellar, 505.
 v. Railway Co., 128.
 v. Warfield, 21.
 v. Welcome, 96, 553.
 v. Wight, 375.
 v. Wood, 86.
 v. Woodbridge, 487.
 v. Woodruff, 16.
 Kinghorne v. Telegraph Co., 42.
 King Iron Bridge & Mfg. Co. v. St. Louis, 409.

[The figures refer to pages.]

Kingman v. Reinemer, 229.
 Kingman & Co. v. Stoddard, 235.
 King of Prussia v. Kuepper, 146.
 King Phillip Mills v. Slater, 455.
 Kingsbury v. Burrill, 366.
 v. Kirwan, 278.
 v. Sargent, 244.
 Kingsley v. Davis, 522, 523.
 v. White, 103.
 Kingston Bank v. Eltinge, 543.
 Kinney v. Ass'n, 295.
 v. McDermott, 269.
 v. Railroad Co., 16.
 Kinsley v. Norris, 503.
 Kintzing v. McElrath, 224.
 Kirby v. Harrison, 409.
 Kirk v. Hartman, 525.
 Kirkham v. Marter, 67.
 Kirkland v. Benjamin, 293.
 v. Randon, 276.
 Kirkpatrick v. Adams, 342.
 v. Gallagher, 18.
 v. Puryear, 435.
 v. Reeves, 230.
 v. Stainer, 517.
 v. Taylor, 108.
 Kirksey v. Kirksey, 40.
 Kitchen v. Lee, 172.
 Kitzinger v. Beck, 368.
 Klapp v. Kleckner, 384.
 Kleckley v. Leyden, 261.
 Klee v. Grant, 33.
 Kleeman v. Frisbie, 369.
 Kleinsorge v. Rohse, 401.
 Kline v. Bank, 520.
 v. Beebe, 166.
 v. L'Amoureux, 157, 159.
 v. Ragland, 440.
 Knapp v. Alvord, 529.
 v. Hoyt, 141.
 v. Insurance Co., 358.
 Knappen v. Freeman, 230.
 Knevals v. Blauvelt, 366.
 Knight v. Abbott, 441.
 v. Cooley, 41.
 v. Lee, 343, 346.
 v. McKinney, 495.
 v. Mann, 101.
 v. Sawin, 297.
 v. Worsted Co., 465.
 Knisely v. Shenberger, 404.
 Knott v. Tidyman, 250.
 Knowlton v. Keenan, 225.
 v. Spring Co., 338.

Knox v. Flack, 154.
 v. Haug, 182.
 v. Martin, 297.
 Knox Rock Blasting Co. v. Stone Co., 413.
 v. White, 335.
 Koch v. Roth, 437.
 v. Williams, 96, 553.
 Koehler v. Buhl, 428.
 Kohl v. Lindly, 222.
 Kohn v. Melcher, 328.
 Koontz v. Bank, 543.
 Kopp v. Reiter, 91.
 Korne v. Korne, 123.
 Kountz v. Price, 269, 270.
 Kowalke v. Light Co., 203.
 Kozel v. Dearlove, 90.
 Kraker v. Byram, 157.
 Kramer v. Old, 309.
 Kranich v. Sherwood, 390.
 Krause v. Busacker, 230.
 Krebs v. O'Grady, 190.
 Kreitz v. Behrensmeyer, 147.
 Kribben v. Haycraft, 286.
 Kriete v. Myer, 85.
 Kriger v. Leppel, 96, 553.
 Kroeger v. Pitcairn, 518, 524.
 Krohn v. Bantz, 89.
 Kromer v. Heim, 491.
 Kronschnabel-Smith Co. v. Kronschnabel, 307.
 Kruschke v. Stefan, 241.
 Kuecken v. Voltz, 404.
 Kuhns v. Gates, 269.
 Kulen Kemp v. Vigne, 277.
 Kullman v. Greenebaum, 257, 258.
 Kunkel v. Wherry, 412.
 Kyger v. Sipe, 162.
 Kyle v. Fehley, 401.
 v. Kavanagh, 202, 203.
 Kynner v. Boll, 207.

L

Laclede Bank v. Schuler, 370.
 Lacy v. Getman, 378.
 v. Green, 404.
 v. Pixler, 166, 169, 173, 177.
 Ladd v. Dillingham, 324.
 v. Hildebrant, 505.
 v. King, 427.
 v. Rogers, 269.
 La Du-King Mfg. Co. v. La Du, 91.

[The figures refer to pages.]

- Lafferty v. Jelley, 298.
 Laffin v. Howe, 546.
 Laffin & Rand Powder Co. v. Sinshelmer, 520.
 Lagerfelt v. McKie, 65.
 Lagodna Nat. Bank v. Portner, 335.
 Laidlaw v. Organ, 205, 221, 223, 224.
 Lakeman v. Pollard, 476, 477, 550.
 Lake Shore & M. S. R. Co. v. Spangler, 319.
 Lakeside Land Co. v. Dromgoole, 40.
 Lamare v. Dixon, 218.
 Lamb v. Crafts, 98, 100.
 v. Henderson, 398.
 v. Lathrop, 440.
 Lambert v. Heath, 469, 546.
 Lamberton v. Dunham, 230.
 Lamine v. Dorrell, 537.
 Lamkin v. Mfg. Co., 83.
 L'Amoureux v. Gould, 119, 129.
 Lampleigh v. Braithwait, 138, 139.
 Lampman v. Cochran, 414.
 Lamprey v. Lamprey, 130.
 Lancaster v. Elliott, 23.
 Lancaster Nat. Bank v. Taylor, 372.
 Lancy v. Havender, 298.
 Landa v. Obert, 241.
 v. Shook, 476.
 Landers v. Bolton, 389.
 Landon v. Hutton, 419.
 Lane v. Corr, 518.
 v. Insurance Co., 274.
 v. Iron Co., 173.
 v. Ironmonger, 501.
 v. Shackford, 80, 92.
 v. Smith, 369.
 Langan v. Iverson, 80.
 Langdon v. Clayson, 169.
 v. Conlin, 292.
 v. Mayor, etc., 406.
 v. Richardson, 68.
 Langellier v. Schaefer, 30.
 Langenberger v. Kroeger, 482.
 Langevin v. St. Paul, 544.
 Langridge v. Levy, 231.
 Langton v. Hughes, 330.
 Lankton v. Stewart, 130.
 Lansden v. McCarthy, 360.
 Lansing v. Dodd, 412.
 v. Railroad Co., 165.
 Lanzit v. Mfg. Co., 308.
 Lapham v. Osborne, 552.
 Lapp v. Smith, 492.
 Larkin v. Hardenbrook, 419.
 Larkin v. Lumber Co., 16.
 Larmon v. Jordan, 31, 33, 35.
 Larned v. Andrews, 261.
 Laroe v. Dairy Co., 492.
 Larsen v. Breene, 441.
 v. Johnson, 73.
 La Rue v. Gilkyson, 181.
 v. Groezinger, 364.
 Lash v. Parlin, 393.
 Latchford, Succession of, 271.
 Latham v. Hartford, 442.
 v. Udell, 247.
 Lathrop v. Bank, 505.
 v. Knapp, 118.
 v. President, etc., 296.
 Lattimore v. Harsen, 128.
 v. Simmons, 378.
 Lauer v. Lee, 418.
 v. Mercantile Inst., 83.
 Lavassar v. Washburne, 501.
 Laverty v. Snethen, 509.
 Law v. Law, 283.
 v. Long, 170.
 v. Stokes, 513, 514.
 Lawing v. Rintles, 473.
 Lawrence v. Bank, 543.
 v. Cooke, 81.
 v. Davey, 128.
 v. Dole, 425.
 v. Fox, 356.
 v. Gayetty, 225.
 v. Kidder, 115.
 v. McCalmont, 113, 407.
 v. Miller, 425, 462.
 v. Oglesby, 108.
 v. Railway Co., 22, 29.
 v. Willis, 179.
 Lawrence's Lessee v. McArter, 154.
 Lawson v. Hogan, 421.
 v. Lawson, 537.
 v. Lovejoy, 168.
 Lawson's Ex'rs v. Lawson, 530.
 Lawton v. Blitch, 278.
 Layman v. Conroy, 247.
 Leach v. Nichols, 198.
 v. Tilton, 471.
 Leacox v. Griffith, 166.
 Leake v. Ball, 69.
 Leatherberry v. Odell, 430.
 Leather Cloth Co. v. Hieronimus, 427.
 Leavitt v. Investment Co., 407.
 v. Palmer, 322.
 v. Sizer, 230.
 v. Stern, 424.

[The figures refer to pages.]

- Lebby v. Ahrens, 233.
 Lecomte v. Toudouze, 74.
 Ledbetter v. Davis, 228.
 v. McGhees, 69.
 v. Walker, 500.
 Lee v. Adkins, 52, 53.
 v. Burnham, 235, 237.
 v. Butler, 88.
 v. Cherry, 45, 83, 88.
 v. Early, 437.
 v. Gaskell, 75.
 v. Griffin, 37, 99.
 v. Hawks, 426.
 v. Merritt, 537.
 v. Muggeridge, 108, 137, 141.
 v. Murdock, 480.
 v. Starbird, 481.
 v. Yandell, 185.
 Leeds v. Gifford, 439.
 v. Little, 431.
 Lee's Adm'r v. Hill, 79, 81.
 Leeson v. Anderson, 130.
 Leete v. Mining Co., 406.
 Le Fevre v. Le Fevre, 425.
 Lefferts v. Weld, 410.
 Legge v. Harlock, 412.
 Le Grand v. Bank, 222, 238.
 Le Grange's Lessee v. Ward, 50.
 Legro v. Staples, 362.
 Lehigh Coal & Nav. Co. v. Brown, 540.
 v. Mohr, 528.
 Lehigh Valley Coal Co. v. Curtis, 31.
 Lehigh Valley R. Co. v. Woodring, 365.
 Lehman v. Feld, 342, 343, 517.
 Lehmann v. Schmidt, 549.
 Leighton v. Orr, 250.
 Leman v. Randall, 96.
 Lemans v. Wiley, 544.
 Lemmon v. Beeman, 150, 172, 173.
 Lenhart v. State, 150.
 Lennon v. Napper, 409.
 Lennox v. Murphy, 23, 24.
 Lente v. Clarke, 86.
 Lenz v. Brown, 45.
 Leonard v. Barker, 494.
 v. Davis, 103.
 v. Dyer, 457.
 v. Hughlett, 58.
 v. Leonard, 182.
 v. Medford, 76.
 v. Patton, 273.
 v. Phillips, 480.
 v. Poole, 313.
 Leopold v. Salkey, 475.
 Leppla v. Mackey, 373.
 Leppoe v. Bank, 53.
 Lerch v. Gallop, 70.
 Lerner v. Johns, 84.
 v. Wanemacher, 82.
 Leroux v. Brown, 91, 97.
 Leskie v. Haselstine, 42.
 Leslie v. Casey, 461.
 v. Lorillard, 289.
 Lester v. Bank, 260.
 v. Buel, 278.
 v. Heidt, 85.
 Lesure Lumber Co. v. Insurance Co.,
 295.
 Leverenz v. Haines, 121.
 Leverick v. Meigs, 515.
 Levering v. Heighe, 163.
 Levey v. Allien, 274, 275.
 v. Railroad Co., 45.
 Levi v. Marsha, 190.
 Levy v. Cohen, 25.
 v. Ford, 423.
 v. Spencer, 302.
 Lewis v. Alexander, 331.
 v. Arbuckle, 180.
 v. Bannister, 245.
 v. Brass, 43.
 v. Brehme, 516.
 v. Bright, 263.
 v. Broun, 298.
 v. Browning, 27.
 v. Bruton, 339.
 v. Insurance Co., 214, 488, 526.
 v. Kerr, 528.
 v. Kramer, 480.
 v. Lee, 189.
 v. Littlefield, 276.
 v. Nicholson, 517.
 v. Payn, 482.
 v. Prather, 91.
 v. Railroad Co., 460.
 v. Rountree, 463, 467.
 v. Sawyer, 355.
 v. Tapman, 72, 447.
 v. Tappan, 81.
 v. Welch, 261, 265.
 v. Willoughby, 390.
 v. Wood, 84.
 Lewis' Ex'rs v. Overby's Adm'rs, 53.
 Lexington Fire, Life & Ins. Co. v.
 Paver, 214.
 Libby v. Robinson, 537.
 Lieberman v. Brothers, 330.
 Liening v. Gould, 130.

[The figures refer to pages.]

- Lightbody v. Insurance Co., 514.
 Lightfoot v. Tenant, 330.
 Lighthall v. Moore, 243.
 Lillie v. Dunbar, 76.
 v. Hoyt, 508.
 Lilly v. Tobbein, 359.
 v. Waggoner, 180.
 Lillywhite v. Devereux, 103.
 Lincoln v. Buckmaster, 183, 184.
 v. Granite Co., 412.
 v. Preserving Co., 41.
 Lindell v. Rokes, 114.
 Lindley v. Groff, 403.
 v. Hofman, 198.
 v. Lacy, 394.
 Lindsay v. Matthews, 442.
 v. Smith, 324.
 Lindsay Pet. Co. v. Hurd, 225.
 Lindsey's Appeal, 18.
 Lindsley v. Railroad Co., 429.
 Liness v. Hesing, 291.
 Lining v. Geddes, 489.
 Lininger & Metcalf Co. v. Wheat, 24.
 Linington v. Strong, 228, 494.
 Link v. Clemmens, 266.
 Linn v. Sigsbee, 115, 307, 311.
 Linneman v. Moross' Estate, 353, 355, 422.
 Linton v. Insurance Co., 272.
 Lipp v. Hunt, 94.
 Lipscomb v. Lipscomb, 392.
 Lipsmeier v. Vehslage, 122.
 Liska v. Lodge, 197.
 Lisle v. Rogers, 480.
 Lister v. Allen, 514.
 Litchfield v. Garrett, 422.
 v. Hutchison, 230.
 Lithgoe v. Vernon, 539.
 Litt v. Martindale, 539.
 Little v. Bank, 362.
 v. Blunt, 141.
 v. Dougherty, 83.
 v. Edwards, 71.
 v. Little, 197.
 v. Martin, 552.
 v. Mills, 335.
 Littlefield v. Bank, 369.
 Little Rock & Ft. S. R. Co. v. Cravens, 244.
 Litton v. Baldwin, 190.
 Litz v. Goosling, 33.
 Liverpool Adelphi Loan Ass'n v. Fairhurst, 189.
 Liverpool & G. W. Steam Co. v. Insurance Co., 346.
 Liversidge v. Broadbent, 363, 422.
 Livingston v. Insurance Co., 219.
 v. Iron Co., 215.
 v. Page, 291.
 v. Railli, 295.
 Llanelly Ry. & Dock Co. v. Railroad Co., 495.
 Lloyd v. Fulton, 72.
 v. Jewell, 470.
 v. Keach, 271.
 v. Scott, 272, 274.
 Lobdell v. Baker, 514.
 Lobenstein v. U. S., 120.
 Locke v. Smith, 160.
 v. Stearns, 524.
 Lockhart v. Hullinger, 291.
 Lockwood v. Coley, 520.
 v. Fitts, 225, 227, 236.
 v. Robbins, 16.
 Lodge v. Dicas, 380.
 v. Hulings, 122.
 Loeb v. Drakeford, 511.
 Loeffel v. Pohlman, 239.
 Loewer v. Harris, 232.
 Logan v. Gardner, 153.
 v. Plummer, 59.
 v. Trayser, 385, 534.
 v. Wallis, 549.
 Logan County Nat. Bank v. Townsend, 194, 505.
 Lombard v. Cobb, 416.
 Lomerson v. Johnston, 223, 245.
 London Assurance v. Mansel, 215.
 London & N. Bank, In re, 27.
 London & N. W. R. Co. v. Price, 193.
 London & S. F. Bank v. Parrott, 407.
 Lonergan v. Buford, 243.
 Long v. Caffrey, 450.
 v. Davidson, 397.
 v. Fox, 186.
 v. Hartwell, 427.
 v. Miller, 88.
 v. Mulford, 250.
 v. State, 280.
 v. Towl, 124, 308.
 v. Warren, 228.
 Long-Bell Lumber Co. v. Stump, 407.
 Long Champs v. Kenny, 535.
 Longley v. Griggs, 385, 534.
 Longridge v. Dorville, 122.
 Longworth v. Mitchell, 30.

[The figures refer to pages.]

- Lonsdale v. Brown, 138, 140.
 Loomis v. Insurance Co., 277, 278.
 v. Newhall, 322.
 v. O'Neal, 538.
 v. Simpson, 511.
 Lord v. Goddard, 230.
 v. Thomas, 446.
 v. Wheeler, 473, 475.
 Lord Bolton v. Tomlin, 65.
 Lorenzen v. Investment Co., 233.
 Lorillard v. Clyde, 356, 405.
 Loring v. Boston, 31, 36, 38, 39.
 v. Cooke, 442.
 Loser v. Board, 285.
 Loud v. Water Co., 451, 453.
 Loudenback Fertilizer Co. v. Phosphate Co., 120.
 London Sav. Fund Soc. v. Bank, 513, 514.
 Loughborough v. McNevin, 442.
 Louisville Asphalt Varnish Co. v. Loric, 83.
 Louisville, N. A. & C. R. Co. v. Goodbar, 364.
 v. Sumner, 288.
 Louisville, St. L. & T. R. Co. v. Neafus, 391.
 Louisville & N. R. Co. v. Cooper, 229.
 v. Dies, 319.
 v. Grant, 319.
 v. Orr, 319.
 v. Philyaw, 92.
 Love v. Buckner, 282.
 v. Harvey, 276.
 v. Moynahan, 188.
 v. State, 242.
 v. Welch, 89.
 v. Wells, 268.
 Lovejoy v. Howe, 357.
 v. Isbell, 228.
 v. Whipple, 269.
 Lovell v. Insurance Co., 449.
 v. Wall, 206.
 Lovelock v. Franklyn, 448.
 Lovering v. Lovering, 448.
 Low v. Andrews, 97.
 v. Forbes, 426.
 v. Hutchinson, 297.
 v. Low, 94.
 Lowber v. Bangs, 210, 451, 464.
 Lowe v. Bryant, 110.
 v. Hamilton, 70.
 v. Harris, 86.
 v. Peers, 303.
 Lowe v. Sinklear, 175.
 Lower v. Schumacher, 183.
 Lowndes v. Chisholm, 207, 226.
 Lowrey v. Drake's Heirs, 171.
 Lowry v. Mehaffy, 452.
 v. Thompson, 145.
 Lozear v. Shields, 180.
 Lubbock v. Tribe, 535.
 Lubert v. Chauviteau, 538.
 Lucas v. Allen, 127.
 v. Bank, 490.
 v. Coulter, 221.
 v. Dixon, 82.
 v. Harper, 276.
 v. Turnpike Co., 375.
 v. Waul, 335.
 Lucke v. Clothing Cutters, 350.
 Luckens v. Hazlett, 275.
 Luddington v. Bell, 423.
 Ludlow v. Hardy, 138, 142.
 v. Simond, 53.
 v. Van Rensselaer, 345.
 Lufkin v. Mayall, 175.
 Lufkin Rule Co. v. Fringeli, 308.
 Lukens v. Hazlett, 271.
 Lum v. McEwen, 302.
 Lumley v. Wagner, 490.
 Lumsden's Case, 161.
 Lundberg v. Elevator Co., 122.
 Lungstrass v. Insurance Co., 34.
 Lunt v. Stevens, 381.
 Lupton v. Freeman, 436.
 Lurton v. Gilliam, 383.
 Lusk v. Throop, 68.
 Lutz v. Linthicum, 517.
 v. Thompson, 451, 461.
 Luzader v. Richmond, 93.
 Lyford v. Railroad Co., 373, 375.
 Lyman v. Babcock, 414.
 v. Railroad Co., 288.
 v. Robinson, 42.
 Lynch v. Doran, 179.
 v. Murphy, 225.
 v. Rosenthal, 280.
 Lynn v. Bruce, 133, 491.
 Lyon v. Bertram, 469.
 v. Jerome, 511.
 v. Kent, 497.
 v. King, 79.
 v. Lenon, 393.
 v. Mitchell, 287.
 v. Respass, 331.
 v. Strong, 266.
 v. Waldo, 333.

[The figures refer to pages.]

Lyons v. Hodgen, 279.
Lythgoe v. Vernon, 539.

M

- McAdams' Ex'rs v. Stilwell, 389.
McAleer v. Horsey, 226.
McAllister v. Hoffman, 291, 339.
 v. Reab, 471.
McAndrew v. Chapple, 466.
McAnnulty v. McAnnulty, 72, 83.
McArthur v. Board, 415.
 v. Luce, 543.
 v. Printing Co., 504.
 v. Sears, 429.
McAvoy v. Long, 403.
McBlair v. Gibbes, 337.
McBratney v. Chandler, 285.
McBrayer v. Cohen, 90.
McBride v. Publishing Co., 229.
McCabe v. Caner, 122.
 v. Gray, 369.
McCall v. Nave, 132.
 v. Parker, 151.
 v. Price, 380.
McCalla v. Mortgage Co., 506.
McCall Co. v. Icks, 45, 120.
McCall's Adm'r v. Capehart, 257, 297.
McCandless v. Steel Co., 127, 284.
McCann v. Eddy, 320.
McCants v. Bee, 249, 251.
 v. Wells, 511.
McCarthy v. Ass'n, 128.
 v. Nash, 102.
McCartney v. Shepard, 327.
McCarty v. Iron Co., 170, 173, 176.
McCaughy v. Smith, 481.
McCaul v. Braham, 490.
McCausland v. Ralston, 437.
McClain v. Davis, 184, 186.
McClair v. Wilson, 240, 244.
McClanahan v. Williams, 170.
McClatchie v. Haslam, 245.
McClay v. Hedge, 462.
McClellan v. Filson, 191.
 v. Kennedy, 122.
 v. Reynolds, 520.
 v. Robe, 422.
McClelland v. Bank, 258.
 v. Rush, 426.
McClun v. McClun, 181.
McClung's Appeal, 115.
McClure v. Briggs, 432, 507.
 v. Jefferson, 467.
McClure v. Lewis, 250.
 v. McClure, 122.
 v. Otrich, 96.
 v. Railroad Co., 20.
McClurg v. Terry, 41.
McClurg's Appeal, 307, 311.
McCollum v. Edmonds, 114.
McComb v. Ass'n, 272.
 v. Wright, 515.
McCombs v. McKennan, 421.
McConahey v. Griffey, 78.
McConihe v. McMann, 330.
McConkey v. Barnes, 154.
 v. Cockey, 217.
McConnell v. Brillhart, 84, 85.
 v. Kitchens, 261, 264.
McConnico v. Curzen, 515.
McCormick v. Basal, 444, 447.
 v. Dalton, 244.
 v. Holbrook, 191.
 v. Leggett, 164.
 v. Littler, 180, 181, 183.
 v. McCormick, 18.
 v. Malin, 250.
McCormick Harvester Co. v. Miller, 242.
McCormick Harvesting Mach. Co. v. Chesrown, 433.
 v. Richardson, 21.
 v. Wilson, 393.
McCotter v. New York, 34.
McCoy's Adm'rs v. Bixbee's Adm'r, 451.
McCracken v. Harned, 31.
 v. San Francisco, 503, 504.
McCrary v. McFarland, 399.
McCrea v. Purmort, 58, 390, 537.
McCreery v. Allender, 147.
 v. Day, 420, 425.
McCrillis v. Allen, 200.
 v. Bartlett, 181, 187.
 v. How, 160.
McCroskey v. Ladd, 452.
McCroy v. Torey, 81.
McCulloch v. Insurance Co., 26.
McCullough v. Ashbridge, 397.
 v. Day, 54.
 v. Hellwig, 396.
McCullough Iron Co. v. Carpenter, 430.
McCurdy v. Rogers, 517, 518.
McCurry v. Gibson, 311.
McCusker v. Spier, 400.
McDonald v. Aufdengarten, 274, 335.

[The figures refer to pages.]

- McDonald v. Dana, 395.
 v. Fleming, 301.
 v. Haughton, 302.
 v. Kneeland, 370.
 v. Longbottom, 395.
 v. Lund, 337.
 v. Lynch, 542.
 v. Magruder, 385, 534.
 v. Sargent, 151.
 v. Youngbluth, 95.
 McDonough v. Marble Co., 453.
 v. Webster, 339.
 McDougal v. Dougherty, 441.
 McDowell v. Laev, 358.
 McEacheran v. Railroad Co., 320.
 McElfatrick v. Hicks, 274.
 McElree v. Wolfersberger, 77.
 McElroy v. Buck, 83.
 v. Ludlum, 80, 92.
 v. Seery, 84, 88.
 v. Swope, 75.
 McElven v. Sloan, 109.
 McFadden v. Henderson, 409.
 McFarland v. Bank, 274.
 v. Sikes, 392.
 McFarlane v. Cushman, 494.
 McGan v. Marshall, 170.
 McGarren v. McNulty, 432.
 McGarvey v. Roods, 17.
 McGatrick v. Wason, 267.
 McGee v. Craven, 74.
 McGibbons v. Wilder, 228.
 McGinn v. Tobey, 197, 198, 229, 249.
 McGinnis v. Fernandes, 96.
 McGlynn v. Scott, 124.
 McGoren v. Avery, 545.
 McGovern v. Hern, 84.
 McGrath v. Cannon, 453.
 v. Clark, 479, 481.
 v. Gegner, 441.
 v. Merwin, 268.
 McGraw v. Solomon, 239.
 MacGreal v. Taylor, 173.
 McGregor v. Balch, 380.
 v. McGregor, 78.
 v. Railway Co., 540.
 McGrew v. Produce Exchange, 279.
 Machesney v. Brown, 521.
 McIniffe v. Wheelock, 441.
 McIntosh v. Johnson, 130.
 McIntosh v. Zaring, 382.
 McIntyre v. Kennedy, 436.
 v. Park, 506.
 v. Parks, 329.
 McJilton v. Love, 493.
 Mack v. Miller, 492.
 McKamy v. Cooper, 152, 168, 177.
 McKanna v. Merry, 156, 157, 159.
 Mackay v. Bloodgood, 500.
 McKee v. Jones, 343.
 McKeever v. Beacom, 260.
 McKenna, Ex parte, 280.
 v. Kirkwood, 369.
 MacKensie v. Coulson, 401.
 v. Culbreth, 130, 131.
 v. Donnell, 184.
 v. Flannery, 273.
 v. Harrison, 130.
 v. Nevins, 508, 517.
 Mackerell v. Batchelor, 156.
 McKewan v. Sanderson, 258.
 Mackey v. Peterson, 198.
 v. Smith, 68.
 McKinley v. Irvine, 510.
 v. McGregor, 188.
 v. Watkins, 21, 119, 122, 124.
 McKinnell v. Robinson, 330.
 McKinney v. Alvis, 422.
 v. Andrews, 330.
 v. Bradlee, 428.
 v. Harvie, 92, 552.
 McKinnis v. Estes, 268.
 McKinnon v. McEwan, 487.
 v. McKinnon, 75.
 v. Vollmar, 216, 524.
 Macklem v. Fales, 227.
 McKnight v. Dunlop, 102.
 MacKnight Flintic Stone Co. v. New York, 460.
 McLanahan v. Insurance Co., 214.
 McLaren v. Hall, 501.
 Maclay v. Harvey, 27, 28, 31.
 McLean v. McBean, 110.
 McLellan v. Bank, 381.
 v. McLennan, 344.
 McLeod v. Barnum, 471.
 Maclure, Ex parte, 449, 553.
 McMahan v. Smith, 293.
 McManus v. Bank, 492.
 v. Boston, 83.
 v. Cooke, 93.
 McMaster v. Merrick, 438.
 McMasters v. Railroad Co., 398.
 McMichael v. Carlyle, 55.
 McMicken v. Safford, 123.
 McMillan v. Ames, 33, 59.
 v. Fox, 476.
 v. Harris, 258.

[The figures refer to pages.]

- McMillan v. Page, 18.
 McMinn v. Richmonds, 160.
 McMullen v. Hoffman, 290, 322, 337.
 McMurphy v. Garland, 424.
 McNair v. Toler, 148.
 McNairy v. Bell, 272.
 McNaughton v. Partridge, 58.
 McNeil v. Armstrong, 433.
 McNish v. Reynolds, 420, 426.
 Macomb v. Wilkinson, 391.
 McPherson v. Cox, 78, 244, 299.
 v. Robertson, 414.
 v. Ryan, 488.
 v. Watt, 510.
 McQuade v. Rosecranz, 323.
 McRaven v. Crisler, 483.
 McShane v. Hazelhurst, 235.
 McSparran v. Neeley, 188.
 Mactier's Adm'rs v. Frith, 22, 26, 27,
 30, 37.
 McVeigh v. U. S., 148.
 McWhinne v. Martin, 94.
 McWilliam v. Webb, 362.
 Maddick v. Marshall, 514.
 Maddison v. Alderson, 93.
 Maddox v. Simmons, 179.
 Maddux v. Bevan, 131.
 Magee v. Lumber Co., 428, 433.
 v. Scott, 269.
 v. Welsh, 158.
 Magill v. Stoddard, 393.
 Magoon v. Reber, 241.
 Maguire v. Eichmeier, 483.
 v. Smock, 291.
 Mahana v. Blunt, 94.
 Mahler v. Newbauer, 441.
 Maine v. Railroad Co., 319.
 Main St. & A. P. R. Co. v. Traction
 Co., 128.
 Maitland v. Martin, 508.
 Majestic, The, 19.
 Makin v. Watkinson, 461.
 Malcomson v. Wappoo Mills, 475.
 Mallan v. May, 59, 403.
 Mallon v. May, 324.
 Mallory v. Gillett, 69-71.
 v. Leach, 222.
 Mallory's Adm'rs v. Mallory's Adm'r,
 72.
 Malone v. Philadelphia, 412.
 v. Railroad Corp., 20.
 Maloney v. Nelson, 339.
 Maltby v. Austin, 409.
 Manby v. Scott, 188.
 Manchester Paper Co. v. Moore, 395.
 Manchester & L. R. Co. v. Railroad
 Co., 194.
 Mandeville v. Harman, 310, 311.
 v. Welch, 366, 367.
 Mandlebaum v. Gregovich, 261.
 Maness v. Henry, 419.
 Mangles v. Dixon, 369.
 Manhattan Oil Co. v. Lubricating Co.,
 120.
 Mann v. Farnum, 19.
 Manning v. Gasharie, 505.
 v. Johnson, 153, 173, 177, 178.
 v. Riley, 73.
 v. Sprague, 299.
 Manor v. Pyne, 16.
 Manry v. Wixelbaum Co., 24.
 Mansfield v. Gordon, 162.
 v. Hodgdon, 33.
 v. Inhabitants, 399.
 v. Lynch, 544.
 v. Sherman, 490.
 v. Watson, 186, 187, 237.
 Mansfield & S. C. R. Co. v. Veeder,
 402.
 Manter v. Churchill, 122.
 Manuel v. Wulff, 147.
 Manufacturers' Bank v. Follett, 480.
 Maple v. Railroad Co., 522.
 Maples v. Wightman, 153.
 Marble v. Oil Co., 43.
 Marble Co. v. Ripley, 490.
 Marble Sav. Bank v. Mesarvey, 356,
 357.
 March v. Ward, 415.
 Marchant v. Hayes, 431.
 Marcy v. Marcy, 80.
 Marden v. Champlin, 83.
 Maricle v. Brooks, 241.
 Marie v. Garrison, 258.
 Markland Min. & Mfg. Co. v. Kimmel,
 407.
 Markle v. Hatfield, 435.
 Marquis v. Lauretson, 393.
 Marr v. Shaw, 37.
 Marriner v. Dennison, 233, 393.
 Marryat v. Marryat, 58.
 Marschall v. Vineyard Co., 83.
 Marsh v. Chown, 137.
 v. Falker, 229.
 v. Garney, 367.
 v. Gold, 327.
 v. Griffin, 479.
 v. Hyde, 102, 104.

[The figures refer to pages.]

- Marsh v. Keating, 539.
 v. McPherson, 467.
 v. Rainsford, 138.
 v. Rouse, 102.
 v. Russell, 314.
 v. Webber, 224.
- Marshall v. Ferguson, 76.
 v. Gougler, 481.
 v. Green, 76.
 v. Lynn, 65.
 v. Marshall, 179.
 v. Perry, 398, 399, 464.
 v. Railroad Co., 285.
 v. Rice, 271.
 v. Rutton, 188.
- Marshalltown Stone Co. v. Mfg. Co.,
 107, 121.
- Marston v. Bigelow, 355.
 v. Insurance Co., 390.
- Martendale v. Follett, 481.
- Martin v. Amos, 297.
 v. Batchelder, 79.
 v. Black, 124.
 v. Crump, 382.
 v. Deetz, 488.
 v. Drinan, 376.
 v. Dwelly, 188, 190.
 v. Flabarty, 56.
 v. Fuel Co., 28.
 v. Hall, 398.
 v. Hamlin, 478.
 v. Hudson, 31.
 v. Hunt, 476.
 v. Insurance Co., 482.
 v. McCormick, 207.
 v. Maynard, 398.
 v. Nixon, 122.
 v. Richardson, 369.
 v. Royster, 282.
 v. Shoenberger, 457.
 v. Smith, 197, 394, 520.
 v. Thomas, 481, 482.
 v. Veeder, 298.
 v. Wade, 283.
- Martindale v. Smith, 410.
- Martine v. Insurance Co., 476, 529.
- Martinsburg & P. R. Co. v. March,
 460.
- Martus v. Houck, 550.
- Marvel v. Phillips, 378, 476.
- Marvin v. Inglis, 181.
 v. Marvin, 243.
 v. Treat, 40.
- Marx v. McGlynn, 249.
- Maryland Coal Co. v. Railroad Co.,
 403.
- Maryland Fertilizing & Mfg. Co. v.
 Lorentz, 465.
- Mascolo v. Montesanto, 123, 243.
- Maslin v. Hiett, 381.
- Mason v. Caldwell, 503.
 v. Campbell, 131, 138, 492.
 v. Douglas, 436.
 v. Eldred, 380, 493.
 v. Hall, 356.
 v. McLeod, 341.
 v. Prendergast, 541.
 v. Taylor, 515.
 v. Wright, 150, 158.
- Massachusetts Gen. Hospital v. Fair-
 banks, 16, 181.
- Massachusetts Loan & Trust Co. v.
 Welch, 369.
- Massey v. Wallace, 301, 323.
- Masson v. Bovet, 236, 238.
- Master v. Miller, 363, 479.
- Masterson v. Howard, 147.
- Master Stevedore's Ass'n v. Walsh,
 317.
- Mastin v. Marlow, 252.
- Masury v. Southworth, 373-376.
- Materne v. Horwitz, 257.
- Mathews v. Cowan, 176.
 v. Toogood, 273.
- Mathis v. Thomas, 441.
- Matson v. Blosson, 275.
 v. Wharam, 67.
- Matteson v. Ellsworth, 483.
 v. Holt, 464.
- Matthews v. Baxter, 186, 187.
 v. Bliss, 222.
 v. Coe, 273.
 v. Milton, 67, 68.
 v. Paine, 343, 344.
- Matthiessen & Weichers Refining Co.
 v. McMahon's Adm'r, 183, 528.
- Mattingly v. Lewisohn, 494.
- Mattock v. Kinglake, 451, 452.
 v. Reppy, 237.
- Maurer v. Midway, 380.
- Maurin v. Fogelberg, 68.
- Maury v. Iron Co., 399.
- Maxfield v. West, 93.
- Maxwell v. Allen, 412.
 v. Brown, 101.
 v. Day, 423.
 v. Griswold, 244.
 v. Lee, 467.

[The figures refer to pages.]

- May v. Crawford, 412.
 v. Flint, 274.
 v. Telegraph Co., 518.
 v. Ward, 85.
 v. Williams, 70.
 Mayer v. New York, 542.
 Maynard v. Hill, 7.
 v. Maynard, 224.
 v. Polhemus, 376.
 v. Tabor, 30.
 Mayor v. Schaub Bros., 455.
 Mayor, etc., of Alexandria v. Patten, 437.
 Mayor, etc., of Allegheny v. Railroad Co., 406.
 Mayor, etc., of New York v. Railroad Co., 406.
 Mayo's Ex'r v. Carrington's Ex'r, 252.
 Mays v. Williams, 346.
 Meacham v. Dow, 283.
 v. Meacham, 74.
 Mead v. Bunn, 228.
 v. Hughes, 190.
 v. Parker, 86.
 v. Spalding, 501.
 v. Watson, 67, 68.
 Meadow v. Bird, 335.
 Meadows v. Meadows, 90.
 Mechanical Boiler Cleaner Co. v. Kellner, 100.
 Mechanics' & Traders' Nat. Bank v. Crow, 335.
 Mecorny v. Stanley, 122.
 Medbury v. Watrous, 175, 553.
 v. Watson, 227.
 Medrano v. State, 243.
 Meech v. Lee, 293.
 Meehan v. Sharp, 101, 102.
 Meek v. Atkinson, 242.
 Meekins v. Newberry, 393.
 Meguire v. Corwine, 283, 287.
 Mehan v. Thompson, 436.
 Mehlhop v. Rae, 162, 166.
 Meigs v. Dexter, 55.
 Melcher v. Flanders, 389.
 Melchers v. Springs, 21.
 Melchoir v. McCarty, 265, 270.
 Mellish v. Robertson, 207.
 Mellon v. Davison, 86.
 Memphis & C. R. Co. v. Reeves, 429.
 Menage v. Rosenthal, 400, 407.
 Menkins v. Lightner, 179.
 Mentz v. Insurance Co., 295.
 v. Newitter, 84.
 Merchant v. O'Rourke, 22, 114.
 Merchants' Bank v. Rawls, 537.
 v. Weill, 369.
 Merchants' Ins. Co. v. Prince, 400.
 Merchants' Nat. Bank v. Bank, 544.
 Merchants' & Farmers' Nat. Bank v. McElwee, 392.
 Merck v. Mortgage Co., 273.
 Meredith v. Crawford, 176.
 Meriden Britannia Co. v. Zingsen, 69.
 Meriwether v. Smith, 268.
 Meroney v. Ass'n, 344.
 Merriam v. Cunningham, 156, 158, 159, 177.
 v. Lumber Co., 356.
 v. U. S., 395.
 v. Wolcott, 469.
 Merrick v. Giddings, 129.
 v. Wiltse, 464.
 Merrick's Estate, In re, 517, 528.
 Merrick Thread Co. v. Mfg. Co., 505.
 Merrill v. Downs, 268.
 v. Kenyon, 519, 521.
 v. Packer, 275.
 v. Peaslee, 304.
 v. Wilson, 237, 505.
 Merritt v. Bucknam, 257.
 v. Clason, 500.
 v. Gumaer, 179.
 Merry v. Lynch, 529.
 Merryfield v. Willson, 545.
 Merryman v. David, 510.
 Merryweather v. Nixan, 534.
 Mers v. Insurance Co., 119.
 Mersereau v. Lewis, 70.
 Mersey Steel & Iron Co. v. Naylor, 410, 455, 456.
 Mersman v. Werges, 479, 481.
 Merwin v. Arbuckle, 230.
 Messer v. The Fadettes, 257.
 Messmore v. Cunningham, 85, 94.
 Metcalf v. Kincaid, 365.
 v. Williams, 520.
 Methven v. Power Co., 370.
 Metropolitan Ins. Co. v. McCoy, 53.
 Mette v. Feltgen, 175.
 Mettel v. Gales, 426.
 Meux v. Bell, 368.
 Newburn's Heirs v. Bass, 96.
 Meyer v. Dremer, 399.
 v. Estes, 380.
 v. Hartman, 70.
 v. Howarth, 141, 188.
 v. Huneke, 483.

[The figures refer to pages.]

- Meyer v. Muscatine**, 273.
 v. Richards, 469.
Meyers v. Hockenbury, 122.
Michael v. Bacon, 330.
 v. Jones, 512, 519.
Michals v. Godts, 463.
Michigan Bolt & Nut Co. v. Steel, 29, 120.
Michigan Cent. R. Co. v. Coleman, 398.
Michigan Cent. R. Co. v. Mfg. Co., 20.
Michigan S. & N. I. R. Co. v. McDonough, 429.
Middlebury College v. Chandler, 156.
Middlesex Water Co. v. Knappmann Whiting Co., 473.
Middleton v. Hoge, 168.
Mighell v. Dougherty, 100.
Mihills Mfg. Co. v. Day, 487.
Milberry v. Storer, 483.
Miles v. Ass'n, 299, 300.
 v. Iron Co., 116.
 v. Lingerman, 175.
 v. New Zealand, etc., Co., 125.
 v. Ogden, 505.
 v. Schmidt, 295.
 v. Stevens, 203.
Milks v. Rich, 71.
Millard v. Barton, 198.
 v. Hewlett, 176.
Mill-Dam Foundry v. Hovey, 466.
Miller v. Ammon, 260.
 v. Baker, 76.
 v. Ball, 94.
 v. Bryden, 243.
 v. Covert, 493.
 v. Craig, 204.
 v. Douville, 32.
 v. Edgerton, 390.
 v. Eldredge, 96.
 v. Elliott, 311.
 v. Finley, 186, 481.
 v. Fletcher, 56.
 v. Gilleland, 480.
 v. Goddard, 462.
 v. Hirschberg, 326.
 v. Kendig, 44.
 v. Lynch, 69.
 v. Marckle, 337.
 v. Miller, 240, 243, 304, 439, 538.
 v. Minor, 246.
 v. Moore, 398.
 v. Post, 261, 263.
 v. Reed, 480.
Miller v. Simonds, 250.
 v. Sims, 161, 162.
 v. Smith, 156, 173.
 v. Way, 520.
 v. Wilson, 97.
Millerd v. Thorn, 423.
Milliken v. Barrow, 147.
Million v. Ohnsorg, 298.
Mills v. Bank, 398.
 v. Guardians of the Poor, 542.
 v. Mills, 285.
 v. Williams, 267.
 v. Wyman, 109, 138, 140, 142.
Millsaps v. Bank, 421.
Mills Pub. Co. v. Larrabee, 145.
Miln v. Patty, 437.
Milnes v. Duncan, 542.
Milroy v. Iron Co., 366.
Milwaukee Masons' & Builders' Ass'n v. Niezerowski, 313, 318.
Milwaukee & St. P. R. Co. v. Railroad Co., 299.
Minard v. Mead, 841.
Miner v. Lorman, 496.
Minett v. Forrester, 527.
Ming v. Corbin, 453.
 v. Norfolk, 232.
Minis v. Nelson, 398, 400.
Minneapolis Land Co. v. McMillan, 112.
Minneapolis & St. L. Ry. Co. v. Mill Co., 28, 29, 36.
Minnesota Linseed Oil Co. v. Lead Co., 26, 27, 31.
Minnesota Lumber Co. v. Coal Co., 45, 120.
Minock v. Shortridge, 153, 160, 162.
Minor v. Sharon, 224.
Minshull v. Oakes, 374.
Minturn v. Main, 515.
Minzesheimer v. Doolittle, 337.
Miskey's Appeal, 248.
Misner v. Knapp, 277.
Missisquoi Bank v. Sabin, 117.
Mississippi & D. S. S. Co. v. Swift, 43.
Mississippi & T. R. Co. v. Green, 474.
Missouri Pac. R. Co. v. Railroad Co., 21.
Mitchel v. Reynolds, 306.
Mitchell v. Beck, 71.
 v. Dougherty, 295.
 v. Hawley, 491.
 v. Homfray, 250.
 v. Kingman, 179.

[The figures refer to pages.]

- Mitchell v. McDougall, 216, 223.
 v. Merrill, 440.
 v. Railton, 200.
 v. Reynolds, 306.
 Mitchell v. Scott, 265.
 v. Vance, 283.
 v. Wedderburn, 407.
 Mitchell's Lessee v. Ryan, 54, 55.
 Mitchinson v. Hewson, 151.
 Mittenenthal v. Mascagni, 295.
 Mitts v. McMoran, 69.
 Mixer v. Howarth, 100.
 v. Sibley, 148.
 Moale v. Hollins, 478.
 Mobberly v. Mobberly, 394.
 Mobile Sav. Bank v. McDonnell, 390.
 Mobile & M. R. Co. v. Jurey, 393, 404, 575.
 Mobray v. Leckie, 414.
 Moffett Hodgkins & Clarke Co. v. Rochester, 206, 401.
 Mohler v. Carder, 216.
 Mohney v. Evans, 159.
 Mohr v. Miesen, 278, 280, 334, 342.
 v. Tulip, 182.
 Moley v. Brine, 154.
 Moline Milburn Co. v. Franklin, 233.
 Moloney v. Nelson, 339.
 Molton v. Camroux, 183.
 Monarch Cycle Mfg. Co. v. Wheel Co., 410, 456.
 Moncrieff v. Goldsborough, 258.
 Mondel v. Steel, 469.
 Monmouth Park Ass'n v. Iron Works, 412.
 v. Warren, 404, 414.
 Monroe v. The Iowa, 319.
 Montag v. Linn, 479.
 Montague v. Garnett, 80, 91, 552.
 Montana Min. Co. v. Milling Co., 416.
 Montclair Military Academy v. Railway Co., 291.
 Montgomery v. Downey, 139.
 v. Edwards, 91, 96.
 v. Lampton, 138.
 v. Rief, 357.
 v. Waterworks, 530.
 Montgomery County v. Robinson, 38.
 Montgomery R. Co. v. Hurst, 481.
 Montreal Lumber Co. v. Mihills, 224, 230.
 Monumental Bldg. Ass'n v. Herman, 159.
 Moody v. Blake, 200, 235.
 Moody v. Walker, 537.
 v. Wright, 365.
 Mooney v. Davis, 231.
 v. Iron Co., 468, 551.
 v. Miller, 224.
 Moore v. Appleton, 508.
 v. Ass'n, 237.
 v. Bevier, 382.
 v. Campbell, 427.
 v. Cross, 225.
 v. Earl, 57.
 v. Elmer, 139.
 v. Flynn, 55.
 v. Garwood, 545.
 v. Giles, 54.
 v. Hershey, 184.
 v. Ivers, 482.
 v. Kiff, 438.
 v. Lockett, 513.
 v. Locomotive Works, 128, 419.
 v. McKenney, 123.
 v. Mandelbaum, 510.
 v. Moore, 238, 251, 510.
 v. Norman, 442.
 v. Pierson, 26, 35.
 v. Powell, 88.
 v. Redding, 126.
 v. Small, 95.
 v. Stone, 525.
 v. Tanning Co., 194.
 Moote v. Scriven, 409.
 Mordecai v. Dawkins, 331, 483, 490.
 v. Pearl, 173.
 More v. Bennett, 316.
 v. Bonnet, 308, 324.
 Morehouse v. Bank, 492.
 v. Constock, 469.
 Moreland v. Atchison, 226.
 v. Houghton, 500.
 Morley v. Lake Shore & M. S. Ry., 531.
 Morford v. White, 549.
 Morgan v. Andrews, 350.
 v. Birnie, 460.
 v. Randolph & Clowes Co., 354.
 Morison v. Thompson, 509.
 Morley v. Attenborough, 546.
 Morrell v. Quarles, 38, 284.
 Morrill v. Aden, 169.
 v. Blackman, 221.
 v. Everson, 115.
 v. Nightingale, 243.
 Morris v. Brightman, 42.
 v. Gaines, 70.

[The figures refer to pages.]

- Morris v. Henderson**, 298.
 v. Mfg. Co., 307.
 v. Norfolk, 188.
 v. Norton, 109.
 v. Osterhout, 67.
 v. Tarin, 541.
 v. Telegraph Co., 278.
 v. Thompson, 224.
Morrison v. Bennett, 337.
 v. Davis, 429.
 v. Faulkner, 241, 243.
 v. Garth, 479.
 v. Herrick, 94.
 v. Kendall, 422.
 v. Orr, 509.
 v. Rogers, 303.
 v. Smith, 436.
Morris Run Coal Co. v. Coal Co., 313.
Morris v. Harveys, 436.
Morrissey v. Broomal, 429.
 v. Perry, 152.
Morrow v. Express Co., 120.
Morse v. Bellows, 15, 38.
 v. Brackett, 238.
 v. Crate, 140.
 v. Ely, 174.
 v. Moore, 463, 467.
 v. Rathbun, 412.
 v. Ryan, 283.
 v. Tappan, 531, 533.
 v. Wheeler, 167.
 v. Woodworth, 241, 243.
Morse Twist Drill. & Mach. Co. v. Morse, 316.
Morss v. Salisbury, 403.
Mortland v. Mortland, 60.
Morton v. Burn, 363.
 v. Dean, 90.
 v. Lamb, 451, 459, 461.
 v. Nelson, 75.
 v. Scull, 230.
 v. Stewart, 160.
 v. Thurber, 273.
Morton's Adm'r v. Morton, 251.
Morville v. Society, 193.
Mory v. Michael, 354.
Moseley v. Boush, 364.
 v. Vanhooser, 268.
Moseley's Adm'rs v. Buck, 510.
Moses v. Arnold, 537.
 v. Bank, 87.
 v. McClain, 87, 120.
 v. Macferlan, 541.
 v. Stevens, 176.
Moss v. Atkinson, 83.
Motherway v. Wall, 206, 226.
Motley v. Head, 528.
Mott v. Mott, 182.
 v. Oppenheimer, 375.
 v. Rowland, 343.
Motz v. Mitchell, 243.
Moulton v. Harris, 94.
 v. Kershaw, 41, 42.
Mound v. Barker, 328.
Mount v. Scholes, 494.
 v. Waite, 340.
Mountstephen v. Brooke, 380.
 v. Lakeman, 67, 68.
Mowatt v. Wright, 543.
Moyer v. Cantieny, 286, 287.
Muckenburg v. Holler, 304.
Mudgett v. Clay, 94.
Mueller v. Northwestern University, 365.
Muir v. Schenck, 367, 370.
Mulford v. Bowen, 276.
Mulgrew v. Cocharen, 422.
Mulhall v. Quinn, 364, 365.
Mulholland v. Bartlett, 125.
Mullalieu v. Hodgson, 257.
Muller v. Eno, 464.
 v. Kelly, 197.
 v. Pondir, 508.
Mulvany v. Gross, 70.
Mulvey v. King, 216.
Mumford v. Whitney, 76.
Munday v. Whissenhunt, 298.
Mungan v. French, 381.
Munn v. Commission Co., 271, 514.
Munroe v. Perkins, 128, 420, 425.
 v. Pritchett, 216.
Munson v. Steamship Co., 295.
 v. Washband, 156.
Murchie v. Cornell, 463.
Murdock v. Finney, 370.
Murphy v. Crawford, 141, 142.
 v. English, 291.
 v. Helmrich, 520.
 v. Jones, 470.
 v. Webber, 437, 438.
 v. Weil, 381.
Murray v. Brooks, 398.
 v. Flavell, 353.
 v. Harway, 418.
 v. Mayo, 505.
 v. Mumford, 382.
 v. Parker, 401.
 v. Pillsbury, 407.

[The figures refer to pages.]

Murray v. Snow, 133.
 v. Waketield, 286.
 Murto v. McKnight, 69.
 Musick v. Dodson, 141, 142, 183.
 Musselman v. Cravens, 180.
 v. Stoner, 426.
 Musser v. Ferguson Tp., 108.
 Mustard v. Wohlford's Heirs, 151,
 153, 170, 172, 173, 175, 178.
 Mutual Ben. Life Ins. Co. v. Hillyard,
 147, 148.
 v. Wise, 215.
 Mutual Life Ins. Co. v. Hunt, 183
 v. Watson, 367.
 Mutual Reserve Fund Life Ass'n v.
 Taylor, 444.
 v. Woolen Mills, 294.
 Mutual Sav. Inst. v. Enslin, 544.
 Myer v. Grafflin, 68.
 v. Hart, 413.
 v. Wheeler, 455.
 Myers v. Jenkins, 296.
 v. Knabe, 183.
 v. Meinrath, 269, 337.
 v. Munson, 389.
 v. Nell, 484.
 v. Smith, 535.
 v. Tibbals, 397.
 Mygatt v. Coe, 375.
 v. Tarbell, 28, 74, 121.
 Myrick v. Dame, 382.

N

Nagle v. McMurray, 19.
 Nalle v. Paggi, 375.
 Nally v. Reading, 92.
 Napier v. McLeod, 382.
 Nash v. Armstrong, 122, 425.
 v. Jewett, 177.
 v. Lull, 112, 469.
 v. Skinner, 380.
 v. Towne, 404.
 v. Trust Co., 224, 232.
 Nashua & L. R. Corp. v. Railroad
 Corp., 194.
 Nashville & C. R. Co. v. David, 429.
 Nassoiy v. Tomlinson, 132, 492.
 National Bank v. Danforth, 273.
 v. Fink, 284.
 v. Rising, 483.
 v. Segur, 376.
 National Ben. Co. v. Hospital Co., 309.
 National Contracting Co. v. Water
 Power Co., 295.
 National Enameling & Stamping Co.
 v. Haberman, 309.
 National Exch. Bank v. McLoon, 366.
 National Harrow Co. v. Hench, 316.
 v. Quick, 316.
 National Park Bank v. Levy, 435.
 National Refining Co. v. Miller, 32.
 National Shoe & Leather Bank, Ap-
 peal of, 519.
 National Trust Co. v. Gleason, 539.
 Nauman v. Oberle, 235.
 Neal v. Allison, 438.
 v. Reynolds, 237.
 v. Saunderson, 429.
 Nealey v. Greenough, 242.
 Neate v. Harding, 538.
 Neblett v. Macfarland, 238.
 Nebraska & I. Ins. Co. v. Seivers, 63.
 Needles v. Burk, 544.
 v. Needles, 365.
 v. Shaffer, 480.
 Neff v. Horner, 479, 481, 482.
 v. Landis, 178, 238.
 Negley v. Jeffers, 65, 426.
 Neibert v. Baghurst, 93.
 Neibles v. Railway Co., 123.
 Neidefer v. Chastain, 469.
 Neill v. Shamburg, 227.
 Neiswanger v. McClellan, 70.
 Nelson v. Beck, 264.
 v. Boynton, 68, 69, 71.
 v. Brush, 299.
 v. Improvement Co., 85, 92, 95,
 552.
 v. Rogers, 357.
 v. State, 267.
 v. Suddarth, 244.
 Nelson's Will, 247.
 Nerac's Estate, In re, 148, 149.
 Nesbitt v. Helser, 502.
 Nester v. Brewing Co., 313.
 Neustadt v. Hall, 283.
 Newberry Land Co. v. Newberry, 356.
 Newbigging v. Adam, 218.
 New Brunswick & C. R. Co. v. Mug-
 geridge, 216.
 Newburg Petroleum Co. v. Weare,
 374.
 Newby v. Hill, 370.
 Newcastle Mfg. Co. v. Railroad Co.,
 517.

[The figures refer to pages.]

- Newcomb v. Brackett, 448.
 v. Clark, 84, 118.
 v. Raynor, 381.
 Newcomer v. Kline, 208.
 Newell v. Bank, 273.
 v. Fisher, 186.
 v. March, 544.
 v. Meyendorff, 307.
 v. Radford, 84.
 v. Randall, 222.
 New England Dressed M. & W. Co. v. Standard W. Co., 395.
 New England Mortgage Security Co. v. Gay, 273, 390.
 v. Townes, 274.
 Newhall v. Appleton, 396.
 v. Clark, 464.
 v. Wyatt, 541.
 Newhall Engineering Co. v. Daly, 449.
 New Hampshire Ins. Co. v. Noyes, 158.
 New Haven & N. Co. v. Hayden, 415.
 Newman v. Freitas, 304.
 v. Reagan, 430.
 Newport News & M. V. Co. v. McDonald Brick Co.'s Assignee, 474.
 Newsom v. Luster, 389.
 Newsome v. Graham, 545.
 Newton v. Bronson, 91, 506.
 v. Tolles, 204.
 Newton Mfg. Co. v. White, 549.
 New York Bowery Fire Ins. Co. v. Insurance Co., 214.
 New York Building Loan Banking Co. v. Fisher, 177.
 New York Cent. R. Co. v. Lockwood, 319.
 New York Guaranty & Indemnity Co. v. Gleason, 539.
 v. Water Co., 364.
 New York Life Ins. Co. v. Aitkin, 357.
 v. Davis, 147.
 v. Fletcher, 215.
 v. Statham, 410.
 New York & N. H. R. Co. v. Pixley, 15.
 Niagara, The, v. Cordes, 429.
 Niagara Fire Ins. Co. v. Greene, 77, 93.
 Nibert v. Baghurst, 266.
 Nicol v. Fitch, 475.
 Nicholas v. Austin, 425.
 Nicholl v. U. S., 145.
 Nichols v. Bruns, 524.
 Nichols v. Fearson, 271.
 v. Haines, 500.
 v. Johnson, 482.
 v. McCarthy, 249.
 v. McMichael, 222.
 v. Mudgett, 283, 291.
 v. Raynbred, 117, 118.
 v. Steel Co., 445.
 v. Weaver, 81.
 Nichols, Shepard & Co. v. Burch, 390.
 Nicholson v. Combs, 479, 481.
 v. Spencer, 156, 157, 159.
 v. Wilborn, 151, 157.
 Nichols & Shepard Co. v. Snyder, 172.
 v. Soderquist, 470.
 Nickelson v. Wilson, 294.
 Nickerson v. Wheeler, 534.
 Nierosi v. Phillipi, 147.
 Niebuhr v. Schreyer, 272.
 Niemeyer v. Wright, 264.
 Nightingale v. Devisme, 537.
 v. Eiseman, 453.
 v. Withington, 153, 162.
 Nilson v. Morse, 444.
 Nispel v. Laparle, 493.
 Nixon v. Beard, 436.
 v. Bogin, 498.
 Noble v. Ward, 426.
 Nobles v. Bates, 308.
 Noble's Adm'r v. Moses, 248, 250.
 Noel v. Karper, 180.
 v. Murray, 436.
 Noetling v. Wright, 225.
 Noice v. Brown, 350.
 Nolan v. Whitney, 431.
 Nolte v. Hill, 400.
 Nonotuck Silk Co. v. Fair, 399.
 Noonan v. Bradley, 406.
 Nordenfelt v. Maxim-Nordenfelt Co., 309.
 Nordholt v. Nordholt, 152.
 Nordon Steam Co. v. Dempsey, 397.
 Nordyke & Marmon Co. v. Kehlor, 201.
 Norfleet v. Cromwell, 373.
 Norman v. Cole, 286.
 v. Trust Co., 180.
 v. Wells, 373.
 Norrington v. Wright, 210, 410, 455, 456, 463, 465.
 Norris v. Graham, 68.
 v. Harris, 453.
 v. Railway Co., 429.
 v. School Dist., 551.

[The figures refer to pages.]

Norris v. Tayloe, 217, 250.

v. Vance, 167, 177.

v. Vosburgh, 121.

North v. Forest, 100.

v. Mallory, 447.

v. Mendel, 88.

v. Wakefield, 381.

North American Ins. Co. v. Throop, 215.

North British Ins. Co. v. Lloyd, 217.

North Carolina State Loan Ins. Co. v. Williams, 525.

North Chicago St. R. Co. v. Ackley, 298.

Northern v. State, 76.

Northern Cent. Ry. Co. v. Prentiss, 68.

Northern Light Lodge v. Kennedy, 407.

Northern Nat. Bank v. Lewis, 394.

North Liberty Market Co. v. Kelly, 132.

North Platte M. & E. Co. v. Price, 83.

Northrop v. Hill, 233.

Northrup v. Foot, 266.

Northwestern Fertilizing Co. v. Village of Hyde Park, 406.

Northwestern Ins. Co. v. Blankenship, 183.

Northwestern Iron Co. v. Meade, 36.

Northwestern R. Co. v. McMichael, 161.

Norton v. Coons, 534.

v. Doherty, 493.

v. Norton, 251.

v. Tuttle, 299.

Norvell v. Walker, 53.

Norwood v. Lathrop, 432.

Notley v. Buck, 537.

Nottingham, etc., Soc. v. Thurston, 172, 173.

Nounnan v. Land Co., 226.

Nourse v. Prime, 273.

Nova Cesarea Harmony Lodge No. 2 v. White, 374.

Nowack v. Berger, 114.

Nowlan v. Cain, 228.

Noyes v. Loring, 517, 518.

v. Nichols, 404.

v. Parker, 545.

v. Wyckoff, 441, 442.

Nugent v. Smith, 429.

v. Teachout, 552.

v. Wolfe, 70.

Nunez v. Morgan, 96.

O

Oakdale Mfg. Co. v. Garst, 309, 315.

Oakes v. Merrifield, 323.

v. Water Co., 308.

Oakey v. Ritchey, 251.

Oakland Bank of Savings v. Applegarth, 441.

Oatfield v. Waring, 138.

Oatman v. Walker, 441.

Obermyer v. Nichols, 446.

O'Brien v. Bolond, 33.

v. Bound, 380.

v. Prietenbach, 332.

v. Young, 531, 533.

O'Bryan v. Fitzpatrick, 265.

O'Conley v. Natchez, 537, 538.

O'Connor v. Arnold, 511.

Odum v. Riddick, 186.

O'Donnell v. Brand, 418.

v. Leeman, 85, 88.

O'Donohue v. Leggett, 400.

Odum v. Railroad Co., 442.

Oelrichs v. Artz, 440.

v. Ford, 398.

Oelricks v. Ford, 517.

O'Fallon v. Boismenu, 537.

Offord v. Davies, 31.

Offutt v. King, 438.

Ogborn v. Hoffman, 132.

Ogden v. Kirby, 464.

v. Ogden, 72.

v. Raymond, 512, 517.

Ogilvie v. Hallam, 492.

Ogle v. Earl Vane, 422.

O'Hara v. Carpenter, 286.

Ohio Life Ins. & Trust Co. v. Ross, 370.

Ohio Nat. Bank v. Cook, 520.

Ohio & M. R. Co. v. Trapp, 91.

Ohlendorff v. Kanne, 114.

Oisher v. Lazzarone, 297.

O'Keefe v. Allen, 365.

O'Kelly v. Faulkner, 18.

Old Colony R. Co. v. Evans, 89.

Old Colony Trust Co. v. Traction Co., 225.

Oldershaw v. King, 123.

Old Dominion S. S. Co. v. McKenna, 317.

Oleson v. Merrihew, 494.

Oliphant v. Markham, 244.

Olive v. Olive, 537.

Oliver v. Bank, 518.

[The figures refer to pages.]

Oliver v. Cunningham, 252.
 v. Holt, 493.
 v. Houdlet, 162, 163.
 v. Hunting, 86.
 v. Insurance Co., 88, 89.
 Olmstead v. Bailey, 415.
 v. Beale, 462.
 v. Latimer, 126.
 Olson v. Sharpless, 88.
 Olt v. Lohnas, 81.
 Omaha Loan & Trust Co. v. Goodman,
 31.
 O'Mealey v. Wilson, 147.
 O'Neal v. Board, 355.
 v. Hines, 310.
 v. Knippa, 16.
 Oneida Bank v. Bank, 341.
 O'Neil v. Armstrong, 474.
 O'Neill v. Armstrong, 449.
 v. Clark, 358.
 Onion v. Paul, 363.
 Opinion of Justices, 286.
 Orcutt v. Nelson, 329.
 Ordeman v. Lawson, 87.
 Ordinary of State v. Thatcher, 56.
 O'Regan v. Steamship Co., 343, 345.
 Oregonian Ry. Co. v. Navigation Co.,
 50.
 Oregon Pac. R. Co. v. Forrest, 246.
 Oregon Steam Nav. Co. v. Winsor,
 308.
 Oregon & W. Mortg. Sav. Bank v.
 Mortgage Co., 429, 525, 527.
 O'Reilly v. Cleary, 286.
 v. Railroad Co., 493.
 Ormerod v. Dearman, 286.
 Ormes v. Dauchey, 405.
 Ormsbee v. Howe, 239.
 Ormsby v. Rhoades, 17.
 Orne v. Cook, 88.
 O'Rorke v. Bolingbroke, 252.
 O'Rourke v. Percival, 216.
 O'Rourke v. Insurance Co., 163, 171,
 177.
 v. O'Rourke, 343.
 Ort v. Meek, 264.
 v. Mortgage Co., 183, 185.
 Ort v. Fowler, 198.
 Ortman v. Weaver, 31.
 Osage City Bank v. Jones, 50.
 Osborn v. Farwell, 405.
 v. McCowen, 271.
 v. Robbins, 242.
 Osborne v. Kimball, 80, 92.

Osborne v. Martha's Vineyard R., 382.
 v. O'Reilly, 128.
 v. Taylor, 393.
 Osburn v. Throckmorton, 544.
 Oscanyan v. Arms Co., 286, 287, 345.
 Osgood v. Bauder, 394.
 v. Stevenson, 479.
 Osgood's Adm'rs v. Artt, 372.
 O'Shea v. Oil Co., 257.
 Osier v. Hobbs, 109, 138, 139.
 Ostrander v. Scott, 132.
 O'Sullivan v. Overton, 84.
 Oswald v. Fratenburgh, 374.
 Oswego Starch Factory v. Lendrum,
 239.
 Otis v. Cullum, 469.
 v. Pennsylvania Co., 319.
 v. Spencer, 54.
 Ottawa Co. v. Aplin, 145.
 Ottaway v. Lowden, 346.
 Ottumwa Belle, The, 219.
 Oughton v. Seppings, 537.
 Oullahan v. Baldwin, 110.
 Outhwaite v. Luntley, 480.
 Outon v. Rodes, 282.
 Overman v. Kerr, 53.
 Owen v. Long, 150, 151, 153.
 v. Stevens, 68.
 v. White, 501.
 Owens v. Lewis, 76.
 Oxendale v. Wetherell, 453, 551.

P

Pabst Brewing Co. v. Liston, 276, 339
 Pacific R. Co. v. Seeley, 288.
 Packard v. Richardson, 87.
 v. Van Schoick, 397.
 Paddleford v. Thacher, 133.
 Paddock v. Davenport, 35.
 v. Robinson, 304.
 v. Stout, 409.
 v. Stobridge, 224.
 Paducah Lumber Co. v. Water Sup-
 ply Co., 352, 358.
 Paetz v. Stoppleman, 227.
 Page v. Higgins, 401.
 v. Krekey, 187.
 v. Morgan, 102.
 v. Trufant, 59.
 v. Wells, 509.
 Paige v. Hieronymus, 294.
 v. Stone, 513.
 Paine v. Brown, 452.

[The figures refer to pages.]

- Paine v. Loeb, 200.
 v. Sherwood, 487.
 v. Tillinghast, 502.
 v. Upton, 204, 208.
 Painter v. Drum, 287.
 Palanche v. Colburn, 553.
 Palfrey v. Railroad Co., 125.
 Palmer v. Andrews, 223.
 v. Bell, 226, 228.
 v. Britannia Co., 425, 431.
 v. Insurance Co., 31, 435.
 v. Oakley, 188.
 v. Palmer, 54, 403.
 v. Railroad Co., 429.
 v. Roath, 394, 514.
 v. Stebbins, 59.
 v. Stephens, 89.
 v. Temple, 461.
 v. Williams, 506.
 v. Witcherly, 69.
 Palo Alto, The, 37.
 Palo Pinto Co. v. Gano, 360.
 Pangborn v. Westlake, 260.
 Pape v. Wright, 342.
 Paradine v. Jane, 472, 474.
 Paramour v. Yardley, 168.
 Parcell v. McComber, 462.
 Parcher v. Marathon Co., 540.
 Park v. Whitney, 30.
 Parker v. Cochrane, 522.
 v. Cousins, 273.
 v. Crole, 537.
 v. Davis, 182.
 v. Dillingham, 69.
 v. Ibbetson, 430.
 v. Macomber, 477.
 v. Moore, 345.
 v. Pettit, 44*, 441.
 v. Pitts, 269.
 v. Railway Co., 19, 20.
 v. Russell, 447.
 v. Smith, 527.
 Parkersburg v. Brown, 341.
 Parks v. Ingram, 439.
 v. McKamy, 333.
 Parmelee v. Cameron, 252.
 v. Simpson, 55.
 v. Wilks, 267.
 Parmentier v. Taber, 241.
 Parson v. Loucks, 100.
 Parsons v. Ely, 252.
 v. Hill, 163.
 v. Keys, 160.
 v. Woodward, 362.
 Partridge v. Hood, 294.
 v. Insurance Co., 400.
 v. Messer, 257.
 Pass v. Brooks, 95.
 v. Security Co., 273.
 Passano v. Acosta, 111, 509.
 Passmore v. Telegraph Co., 320.
 Patchin v. Cromach, 151.
 v. Swift, 87.
 Paterson v. Gandasequi, 522.
 Patmore v. Colburn, 420.
 Patnote v. Sanders, 441.
 Paton v. Stewart, 292.
 Patrick v. Bowman, 34.
 v. Littell, 191.
 v. Putnam, 477.
 v. Shaffer, 493.
 Pattee v. Greely, 266.
 Patten v. Glatz, 227.
 v. Hicks, 95, 552.
 Patterson v. Caldwell, 366.
 v. Collar, 17, 549.
 v. Cox, 441.
 v. Crowther, 396, 398.
 v. Donner, 292.
 v. Gibson, 245.
 v. Kirkland, 224.
 v. Lippincott, 154, 518.
 v. Martz, 495.
 v. Prior, 539.
 Pattison v. Hull, 438.
 v. Shaw, 145.
 Patton v. Arney, 42.
 v. Gilmer, 145.
 Patty v. Milne, 437.
 Paul v. Hadley, 224.
 v. Kenosha, 469.
 v. Meservey, 420.
 v. Owings, 393.
 v. Smith, 158.
 Pawlak v. Granowski, 94.
 Paxton v. Popham, 59.
 v. Wood, 419.
 Paxton Cattle Co. v. Bank, 122.
 Payne v. Cave, 21, 22, 31.
 v. Haine, 395.
 v. Long, 483.
 v. Mayor of Brecon, 333.
 v. Newcomb, 274.
 v. Wilson, 123.
 Paynter v. Chamberlyn, 107.
 v. Williams, 15, 140.
 P. Cox Shoe Co. v. Adams, 231.
 Peabody v. Bement, 393.

[The figures refer to pages.]

- Peabody v. Kendall, 179.
 v. Norfolk, 312.
 v. Speyers, 83, 289.
 Peace River Phosphate Co. v. Griffin, 455, 487.
 Peacock v. Cummings, 430.
 Pearce v. Brooks, 328.
 v. Railroad Co., 193.
 v. Walker, 437, 438.
 v. Watts, 44.
 v. Wilson, 294.
 Pearl v. McDowell, 181.
 Pearsall v. Dwight, 343.
 Pease v. Hirst, 382.
 Peaslee v. Robbins, 180.
 Peavey v. Tilton, 54, 55.
 Peck v. Brewer, 235.
 v. Briggs, 331.
 v. Cary, 187.
 v. Goff, 69.
 v. List, 258.
 v. Vandemark, 86, 88, 114.
 Peckham v. Balch, 93.
 Peckham Iron Co. v. Harper, 510.
 Peck & Co. v. Corrugating Co., 446.
 Peden v. Railway Co., 373, 375.
 Peebles v. Stephens, 223.
 Peek v. Derry, 233.
 v. Gurney, 216, 221, 232.
 v. Peek, 93, 109.
 Peelman v. Peelman, 129.
 Peerless Glass Co. v. Tinware Co., 204.
 Pegram v. Telegraph Co., 204.
 Peigne v. Sutcliffe, 176.
 Peirce v. Corf, 88.
 Peltz v. Eichele, 308, 324.
 Pemberton v. Vaughan, 310.
 v. Williams, 243.
 Pence v. Langdon, 236.
 Pendergast v. Reed, 227.
 Penfold v. Insurance Co., 404.
 Penn v. Bornman, 261.
 v. Railroad Co., 429.
 Pennell v. Transportation Co., 399.
 Penniman v. Hartshorn, 89.
 Pennington v. Gittings, 108.
 v. Howland, 432.
 Pennock's Appeal, 258.
 Pennsylvania Coal Co. v. Sanderson, 400.
 Pennsylvania Co. v. Dolan, 45, 79.
 v. Lombardo, 300.
 v. Wentz, 324.
 Pennsylvania R. Co. v. Atha, 502.
 Pennville Natural Gas & Oil Co. v. Thomas, 416.
 Pennybacker v. Laidley, 233.
 Pennypacker v. Jones, 412.
 Pennywit v. Foote, 50.
 Penrose v. Curren, 176, 177.
 Pensacola Gas Co. v. Lotze, 403.
 People v. Backus, 406.
 v. Board, 510.
 v. Coler, 260.
 v. Fallon, 277.
 v. Fisher, 317.
 v. Gillson, 260, 280.
 v. Glann, 461, 464.
 v. Gray, 362.
 v. Harrison, 384.
 v. Insurance Co., 475.
 v. Lee, 407.
 v. Marx, 260.
 v. Mercein, 305.
 v. Milk Exchange, 313.
 v. Moores, 151, 152, 158, 548.
 v. Mullin, 151.
 v. Murphy, 407.
 v. Refining Co., 313.
 v. St. Louis, 145.
 v. Sup'rs, 226.
 v. Talmage, 145.
 v. Wood, 538.
 People's Bank v. Bogart, 205, 221, 224.
 v. Borough of Norwalk, 441.
 People's Bldg. Ass'n v. Klauber, 406.
 People's Natural Gas Co. v. Wire Co., 407.
 Peoria & R. I. R. Co. v. Mining Co., 288.
 Pepin v. Société, 268.
 Pepper v. Telegraph Co., 204.
 Perin v. Parker, 534.
 Perine v. Dunn, 297.
 Perkins v. Cheney, 141.
 v. Cummings, 323.
 v. Eaton, 276.
 v. Gay, 202.
 v. Hadseil, 89.
 v. Headley, 132.
 v. Hoyt, 419.
 v. Lockwood, 133.
 v. Savage, 338.
 v. Westcoat, 41, 68.
 Perot v. Cooper, 437, 438.
 Perrin v. Lepper, 374.
 v. Wilson, 157, 159.

[The figures refer to pages.]

- Perrine v. Cheeseman, 49, 53, 111.
 Perry v. Buckman, 471.
 v. Chesley, 496.
 v. Cobb, 295.
 v. Iron Co., 26, 442.
 v. Pearson, 180, 236.
 v. Smith, 500.
 Person v. Chase, 163.
 Persons v. McKibben, 503.
 Peter v. Compton, 77.
 Peters v. Davenport, 284.
 v. Davis, 382.
 v. Fleming, 156, 159.
 v. Grim, 337, 338.
 v. Railroad Co., 540.
 v. Ryland, 288.
 v. Westborough, 79.
 Peters Box & Lumber Co. v. Lesh, 200.
 Peterson v. Homan, 519.
 v. Laik, 170.
 v. Mayer, 462.
 v. New York, 192.
 Petit v. Minnesota, 266.
 Petrie v. Bury, 382.
 v. Torrent, 75.
 v. Williams, 165, 173.
 Pettigrew v. Chillis, 230.
 Pettis v. Ray, 491.
 Pettit's Adm'r v. Pettit's Distributees, 323.
 Petty v. Allen, 491.
 v. Young, 18.
 Peugh v. Davis, 252.
 Peyson v. Conniff, 68.
 Pfaff v. Cummings, 69.
 v. Golden, 374.
 Pfeiffer v. Campbell, 126.
 Pfenning v. Scholer, 274.
 Phelan v. Fitzpatrick, 496.
 v. Gardner, 186.
 Phelps v. Hubbard, 440, 459.
 v. Seely, 425.
 v. Sheldon, 16.
 v. Stillings, 85.
 v. Worcester, 158.
 v. Zuschlag, 242.
 Philadelphia's Appeal, 366.
 Philadelphia, W. & B. R. Co. v. Howard, 451, 453.
 v. Lehman, 267.
 Philbrook v. Belknap, 552.
 Philip Hiss Co. v. Pitcairn, 431.
 Philipson v. Bates, 542.
 Phillips v. Adams, 85.
 v. Barber, 405.
 v. Bristolli, 102.
 v. Com'rs, 296.
 v. Foxall, 217.
 v. Graves, 190.
 v. Green, 170.
 v. Hatch, 147.
 v. Henry, 244.
 v. Innes, 268.
 v. Lloyd, 158.
 v. Moses, 437.
 v. Ocmulgee Mills, 102.
 v. Preston, 117.
 v. Pullen, 116, 123, 124.
 v. Swank, 86.
 v. Wiginton, 485.
 Phillips & Colby Const. Co. v. Seymour, 409, 451, 466.
 Philpson v. Bates' Ex'r, 542.
 Philpot v. Bingham, 154.
 v. Gruninger, 107.
 Phippen v. Stickney, 258.
 Phoenix Ins. Co. v. Badger, 295.
 v. Rink, 126.
 v. Slaughter, 406.
 v. Zlotky, 295.
 Phoenix Mut. Life Ins. Co. v. Raddin, 215.
 Phoenix Pub. Co. v. Clothing Co., 394.
 Picard v. Hire, 191.
 Pickens v. Rymer, 53.
 Pickering v. Appleby, 100.
 v. Busk, 502, 515.
 v. Cease, 278.
 v. De Rochemont, 416.
 v. Gunning, 156.
 v. Railway Co., 322, 325.
 Pickett v. Bank, 437.
 Pierce v. Brown, 240-242.
 v. Burnham, 189.
 v. Fuller, 115.
 v. Hilton, 494.
 v. Indseth, 52.
 v. Jones, 133.
 v. Knight, 439.
 v. Paine, 80.
 v. Pierce, 134, 249, 323.
 v. Seymour, 496.
 v. Tidwell, 392, 403.
 v. Wimberly, 141.
 Piercy v. Hedrick, 513.
 Pierpont v. Wilson, 499.
 Piersol v. Grimes, 482.

[The figures refer to pages.]

- Pierson v. Hoocker, 382.
 v. Morch, 38.
 Pigot's Case, 324, 482.
 Pike v. Brown, 64.
 v. McDonald, 493.
 Pilkington v. Scott, 112.
 Pillans v. Van Mierop, 110.
 Pillen v. Erickson, 270.
 Pillow v. Roberts, 52.
 Pillsbury v. Locke, 402.
 Pinches v. Lutheran Church, 431, 432,
 550.
 Pinckney v. Dambmann, 409.
 Pindall's Ex'rs v. Bank, 435.
 Pingry v. Washburn, 290.
 Pinkham v. Crocker, 515.
 v. Grear, 226.
 v. Pinkham, 207.
 Pinnel's Case, 129, 131.
 Pinney v. Jorgenson, 441.
 v. Railroad Co., 408.
 Piper v. Foster, 80.
 Pipp v. Reynolds, 354.
 Pippen v. Insurance Co., 165, 176.
 Pireaux v. Simon, 65.
 Pitcher v. Bailey, 535.
 v. Layrock, 170.
 Pitman v. Elder, 141.
 Pittman v. Pittman, 445.
 Pittsburg, C., C. & St. L. R. Co. v.
 Cox, 319.
 v. Moore, 319.
 Pittsburg, C., C. & St. L. Ry. v. Vol-
 kert, 296.
 Pittsburg, Ft. W. & C. R. Co. v. Reno,
 373.
 Pittsburgh & L. R. Iron Co. v. Iron
 Co., 207.
 Pixley v. Boynton, 279, 331.
 v. Railroad Co., 192.
 Placer Co. v. Astin, 508.
 Plaisted v. Palmer, 269.
 Planche v. Colburn, 449.
 Plank v. Jackson, 331.
 Plaster v. Rigney, 181.
 Platner v. Sherwood, 148.
 Platt v. Brand, 444.
 v. Colvin, 359.
 Plummer v. Bucknam, 553.
 v. People, 244, 245.
 Poland v. Brownell, 228.
 Polhemus v. Heiman, 453, 463, 469.
 Polhill v. Walter, 232.
 Pollard v. Gibbs, 506.
 Pond v. Carpenter, 183.
 v. Sheean, 93.
 v. Williams, 438.
 Ponder v. Cotton Co., 273.
 Pool v. Boston, 283.
 v. Horner, 139.
 Pooley v. Harradine, 385.
 Poor v. Woodburn, 239.
 Pope v. Allis, 462, 463.
 v. Henry, 505.
 v. Mfg. Co., 408.
 v. Marshall, 271.
 v. Porter, 455.
 Poppett v. Stockdale, 256.
 Popp v. Swanke, 92.
 Poppers v. Meager, 412.
 Port Clinton R. Co. v. Railroad Co.,
 490.
 Porter v. Day, 277, 521.
 v. Dunlap, 367.
 v. Jefferies, 207, 275, 544.
 v. Rose, 117, 459.
 v. Water Co., 489.
 Porterfield v. Butler, 141, 188.
 Portner v. Kirschner, 294.
 Portsmouth Brewing Co. v. Mudge,
 337.
 Posey v. Scales, 459.
 Post v. Bank, 131, 241.
 v. Kearney, 373.
 Pothill v. Walker, 518.
 Potsdamer v. Kruse, 453.
 Potter v. Arnold, 74.
 v. Douglass, 132.
 v. Earnest, 471.
 v. Hopkins, 393.
 v. Jacobs, 94.
 v. McCoy, 380.
 v. Mining Co., 297, 298, 300.
 v. Morland, 396.
 v. Peters, 88.
 v. Sanders, 25.
 v. Tuttle, 409.
 v. Van Vranken, 378.
 Potts v. Bell, 290.
 v. Plaisted, 442.
 v. Polk Co., 123.
 v. Whitehead, 27, 30.
 Poulton v. Lattimore, 464.
 Poussard v. Spiers, 466.
 Powell v. Blow, 423.
 v. Bradlee, 221.
 v. Duff, 56.
 v. Flanary, 294.

[The figures refer to pages.]

- Powell v. Rankin, 71.
 v. Rees, 537.
 Powers v. Bumcratz, 24.
 v. Clarke, 407.
 v. Fowler, 226.
 v. Skinner, 285.
 Powers Dry Goods Co. v. Harlin, 257.
 Pownal v. Ferrand, 534.
 Prater v. Miller, 124.
 Pratt v. Beaupre, 519.
 v. Bowman, 204.
 v. Burhaus, 233.
 v. Humphrey, 66.
 v. Miller, 99.
 v. Trustees of Baptist Soc., 37.
 Pray v. Burbank, 261, 265.
 v. Mitchell, 100.
 Preachers' Aid Soc. v. England, 354.
 Prentiss v. Ledyard, 430.
 Presbery v. Fisher, 324.
 President, etc., of Atlas Bank v. President, 341.
 President, etc., of Bank of Portland v. Brown, 439.
 President, etc., of Delaware & H. Canal Co. v. Coal Co., 295.
 President, etc., of Greenfield Bank v. Crafts, 504.
 President, etc., of Michigan State Bank v. Hammond, 145.
 President, etc., of Niagara Bank v. Roosevelt, 439.
 President, etc., of Springfield Bank v. Merrick, 261.
 Pressed Steel Car Co. v. Railroad Co., 412.
 v. Railway Co., 405.
 Preston v. Bacon, 283.
 v. Boston, 540.
 v. Grant, 492, 493.
 Price v. Bank, 125.
 v. Campbell, 270, 274.
 v. Caperton, 283.
 v. Easton, 352.
 v. Furman, 165, 172, 173, 175.
 v. Hay, 149.
 v. Jennings, 158, 178.
 v. Lien, 92.
 v. McCauley, 216.
 v. Mitchell, 126.
 v. Moulton, 58, 478.
 v. Railroad Co., 383.
 v. Sanders, 158.
 v. Seaman, 363.
 Price v. Seydel, 501.
 Prichard v. Sharp, 242.
 Prickett v. Badger, 485.
 Priest v. Cone, 190.
 v. White, 232.
 Priester v. Priester, 108.
 Priestlie v. Fernie, 522.
 Priestly v. Fernie, 523.
 Prime v. Koehler, 71.
 Primrose v. Telegraph Co., 320.
 Printing & Numerical Registering Co. v. Sampson, 281, 316.
 Pritchard v. Brown, 58.
 v. Norton, 97.
 v. Pritchard, 18.
 Proctor v. Hartigan, 395.
 v. Sears, 167.
 Proprietors of the Canal Bridge v. Gordon, 192.
 Proprietors of Cardigan v. Page, 282.
 Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 406.
 Proprietors of Mill-Dam Foundry v. Hovey, 451, 452.
 Prosser v. Edmonds, 299.
 v. Evans, 381.
 Protector Loan Co. v. Grice, 413.
 Prout v. Fire Dist., 123.
 v. Wiley, 166.
 Prouty v. Edgar, 152.
 Providence Coal Co. v. Coxe, 455.
 Providence Gas-Burner Co. v. Barney, 526.
 Providence Life & Trust Co. v. Fiss, 375.
 Prowse v. Worthinge, 438.
 Prutsman v. Baker, 55, 56.
 Pryor v. Foster, 235.
 Puckett v. Alexander, 261, 264, 346.
 Puffer v. Smith, 198.
 Pugh v. Powell, 538.
 v. Stringfield, 382.
 Pugsley v. Murray, 302.
 Pulliam v. Withers, 481.
 Pulsifer v. Shepard, 442.
 Purcell v. Miner, 94.
 Purdy v. Railroad Co., 319.
 Purner v. Piercy, 76.
 Pursley v. Hays, 169.
 v. Morrison, 502, 513.
 Purves' Estate, In re, 43.
 Purvins v. Harrison, 401.
 Pust v. Dowie, 466, 467.
 Putnam v. Field, 355.

[The figures refer to pages.]

Putnam v. Grace, 28.
 v. Insurance Co., 63.
 v. Sullivan, 198.
 v. Tennyson, 141.
 v. Woodbury, 129.
 Pyke's Case, 331.
 Pyle v. Cravens, 154.
 Pym v. Campbell, 392.
 Pyne v. Wood, 156, 170.

Q

Quarles v. State, 267.
 Quick v. Wheeler, 31.
 Quigley v. De Haas, 393, 451, 461.
 Quimby v. Cook, 272.
 v. Shearer, 197.
 Quinn v. Champagne, 86.
 v. Roath, 409.
 v. Stout, 428.
 Quirk v. Muller, 292.
 v. Thomas, 331.

R

Raabe v. Squier, 72.
 Rabberman v. Wiskamp, 70.
 Raby v. Reeves, 375.
 Radley v. Kenedy, 176.
 Rae v. Hulbert, 531, 533.
 Rafferty v. Lougee, 88.
 Raffles v. Wichelhaus, 202.
 Rafolovitz v. Tobacco Co., 119.
 Ragan v. Chenault, 506.
 Rahter v. Bank, 261.
 Railroad Co. v. Trimble, 407.
 Railsback v. Walke, 81.
 Rains v. Wheeler, 303.
 Raisin v. Clark, 399.
 Rakestraw v. Lanier, 310, 311.
 Raleigh & G. R. Co. v. Reid, 406.
 Ralston v. Boady, 328.
 v. Wood, 435.
 Ramloll v. Soojumnnull, 276.
 Ramsay v. Warner, 438.
 Ramsdell v. Edgarton, 257.
 Ramsey v. Morrison, 272.
 Ramsgate Hotel Co. v. Montefiore, 31,
 36.
 Rand v. Mather, 322.
 v. Webber, 545.
 Randall v. Morgan, 40, 41.
 v. Protective Union, 344.
 v. Randall, 303.

Randall v. Rich, 536.
 v. Smith, 264.
 v. Sweet, 158.
 v. Tuell, 261, 264.
 Randell v. Trimen, 518.
 Randolph v. Halden, 400.
 Randolph Iron Co. v. Elliott, 199.
 Randolph's Ex'r v. Ouidnick Co., 115.
 Rankin v. West, 501.
 Rann v. Hughes, 49, 110, 111.
 Rannels v. Gerner, 182.
 Ransdel v. Moore, 356.
 Raper v. Birkback, 482.
 Rapid Transit Land Co. v. Sanford,
 169.
 Rapley v. Klugh, 395.
 Rappanier v. Bannon, 122.
 Rappleve v. Seeder Co., 360, 364.
 Rathbon v. Budlong, 512.
 Ratliff v. Vandikes, 235.
 Rau v. Boyle, 286.
 Raub v. Smith, 75.
 Rawlins v. Wickham, 235.
 Rawson v. Davidson, 480.
 Rawstorne v. Gandell, 382.
 Ray v. Haines, 164, 175.
 v. Mackin, 258.
 v. Thompson, 428.
 v. Tubbs, 152, 177.
 Raymond v. Insurance Co., 295.
 v. Leavitt, 315, 331.
 Rayner v. Wilson, 216.
 Raynor v. Drew, 77, 393.
 v. Grote, 517.
 Read v. Anderson, 343.
 v. Legard, 181.
 Reading v. Price, 494.
 Ready v. Pinkham, 172.
 Real Estate Sav. Inst. v. Linder, 544.
 Reando v. Misplay, 181.
 Rebman v. Water Co., 552.
 Rector, etc., of St. Mark's Church v.
 Teed, 121.
 Redding v. Lamb, 470.
 v. Wright, 228.
 Redfield v. Davis, 509.
 Redgrave v. Hurd, 218, 228, 233, 236.
 Redlich v. Doll, 483.
 Reed v. Batchelder, 141.
 v. Boshears, 167.
 v. Breeden, 409.
 v. Brewer, 328.
 v. Evans, 87.
 v. Insurance Co., 295, 395, 404.

[The figures refer to pages.]

- Reed v. Lane, 153.
 v. Peterson, 217, 250.
 v. Warehouse Co., 290.
 Rees v. Berrington, 385.
 v. Logsdon, 58, 409.
 Reese v. Medlock, 506.
 Reese River Min. Co. v. Smith, 229, 232.
 Reeve v. Ass'n, 271.
 v. Dennett, 232.
 Reeves v. Brayton, 58.
 v. Corning, 224.
 Reeves' Estate v. Moore, 17.
 Reg. v. Rowlands, 317.
 Regan v. Baldwin, 540, 541.
 Regents of University of Michigan v. Society, 192.
 Reger v. O'Neal, 272.
 Register v. Dodge, 424.
 Reichenbach v. Sage, 473.
 Reichwald v. Hotel Co., 504.
 Reid v. Hibbard, 131.
 Reif v. Paige, 15, 39.
 Reilly v. Chouquette, 405.
 Reindl v. Heath, 451.
 Reinskopf v. Rogge, 186, 187.
 Reitz v. Martin, 513.
 Relief Fire Ins. Co. v. Shaw, 63.
 Renard v. Sampson, 420.
 Rendell v. Harriman, 520.
 Renner v. Bank, 398.
 Rentch v. Long, 100.
 Repetti v. Maisak, 86.
 Reticker v. Katzenstein, 222.
 Reusens v. Staples, 52.
 Reuss v. Picksley, 84, 87, 89, 105.
 Reybold v. Voorhees, 455.
 Reynell v. Sprye, 340.
 Reynolds v. Hassam, 393.
 v. McCurry, 773.
 v. Nugent, 128.
 v. Palmer, 467.
 v. Reynolds, 130.
 v. Robinson, 392.
 v. Stevenson, 266.
 v. Waller's Heirs, 186.
 Rheel v. Hicks, 542, 543.
 Rhine v. Ellen, 390.
 Rhoads v. Jones, 58.
 Rhoda v. Annis, 524.
 Rhodes v. Bates, 250.
 v. Neal, 286.
 v. Rhodes, 181, 547.
 Rhodes v. Sparks, 293.
 v. Wilson, 395.
 Rhone v. Powell, 519.
 Rice v. Boyer, 164, 165, 175-177.
 v. Butler, 175.
 v. Caudle, 488.
 v. D'Arville, 490.
 v. Gist, 276.
 v. Goddard, 471.
 v. Grange, 471.
 v. Insurance Co., 219.
 v. Kahn, 440.
 v. Manley, 350.
 v. Mfg. Co., 207.
 v. Mortgage Co., 130.
 v. Shute, 380, 381.
 v. Williams, 301.
 v. Wood, 302, 509.
 Richard v. Griggs, 367.
 Richards v. Allen, 92.
 v. Day, 391.
 v. Heather, 380, 381.
 v. Seating Co., 309.
 v. Shaw, 16, 453.
 v. Skiff, 389.
 Richardson v. Aiken, 494.
 v. Buhl, 313.
 v. Campbell, 346.
 v. Crandall, 340.
 v. Dorman, 264.
 v. Draper, 381.
 v. Duncan, 242.
 v. Hardwick, 30.
 v. Laboratory, 442.
 v. Lenhard, 36.
 v. Machine Works, 526.
 v. Mining Co., 53.
 v. Pate, 166.
 v. Peacock, 490.
 v. People, 406.
 v. Pierce, 79.
 v. Richardson, 72.
 v. Rountree, 19.
 v. Rowland, 297.
 v. Scotts Bluff County, 285.
 v. Strong, 181.
 v. Williamson, 518.
 Richelleu Hotel Co. v. Encampment Co., 119.
 Richison v. Mead, 433.
 Richmond v. Moore, 266.
 v. Morford, 53, 56.
 v. Robinson, 409.

[The figures refer to pages.]

- Richmond Ice Co. v. Ice Co., 405.
 Richmond Union Pass. R. v. Railroad Co., 77.
 Richmond & D. R. Co. v. Jones, 319.
 Richter v. Stock Co., 471.
 Rick v. Kelly, 435.
 Ricketts v. Harvey, 293, 323.
 Riddle v. Keller, 269.
 Rideal v. Railway Co., 203.
 Rider v. Miller, 251.
 Ridgely v. Crandall, 151.
 Ridgeway v. Herbert, 167, 170, 173.
 Ridgway v. Wharton, 29, 42, 43.
 Ridley v. McNairy, 95.
 Riegel v. Insurance Co., 201.
 Riegelman v. Focht, 69.
 Rigby v. Connol, 317.
 Rigdon v. Walcott, 237.
 Riggan v. Green, 183.
 Riggs v. Bullingham, 138.
 v. Tract Soc., 180.
 Righter v. Warehouse Co., 272.
 Rigs v. Cage, 528.
 Riley v. Carter, 182.
 v. Jordan, 328.
 v. Kershaw, 132.
 v. Mallory, 164, 174.
 v. Taber, 368.
 v. Telegraph Co., 320.
 v. Williams, 553.
 Rimer v. Dugan, 216.
 Rindskoff v. Barrett, 396, 403.
 Ring v. Jamison, 167.
 Ringer v. Holtzelaw, 85.
 Rio Grande, The, v. Otis, 50.
 Riordan v. Church, 358.
 Rioux v. Brick Co., 408, 410, 466.
 Ripley v. Case, 545.
 v. Crooker, 380.
 v. Insurance Co., 215.
 Rippy v. Grant, 251.
 Risley v. Bank, 366.
 Rison v. Newberry, 221.
 Ritchie v. Atkinson, 453, 454.
 v. Smith, 262.
 Ritter v. Insurance Co., 300.
 Rivers v. A. & C. Wright & Co., 366.
 v. Gregg, 155, 157, 159.
 River Steamer Co., In re, 496.
 Rives v. Dudley, 442.
 Roach v. Quick, 151.
 Robbins v. Ayres, 58, 356, 358.
 v. Barton, 227.
 v. Eaton, 168.
 Robbins v. Kimball, 75.
 Robert v. Barnum, 133.
 Roberts v. Bonaparte, 394, 395, 404.
 v. Button, 518.
 v. Carter, 369.
 v. Cobb, 114.
 v. Donovan, 217, 223.
 v. Levy, 264.
 v. Rockbottom Co., 78.
 v. Rumley, 505.
 v. Security Co., 32, 54.
 v. Smith, 44.
 v. Tennell, 81.
 v. White, 441.
 Robertson v. Frank Bros. Co., 540.
 v. Hunter, 68.
 v. Parks, 225.
 v. Robinson, 282.
 v. Tapley, 28.
 Robinson v. Bank, 520.
 v. Barrows, 346.
 v. Batchelder, 426.
 v. Bland, 344, 345.
 v. Cook, 441.
 v. Coulter, 153.
 v. Davison, 477, 550.
 v. Doolittle, 438.
 v. Fairbanks, 428.
 v. Gould, 244.
 v. Green, 324.
 v. Harman, 486.
 v. Jewett, 127.
 v. Kalbfleish, 291.
 v. Marshall, 368.
 v. Read, 436, 437.
 v. Templar Lodge, 295.
 v. Weeks, 150, 172.
 v. Weller, 30.
 Robson v. Bohn, 451, 455, 456.
 v. Drummond, 360, 364.
 Roby v. Carter, 291.
 v. Cossitt, 503.
 Rochester v. Levering, 510.
 Rochester Lantern Co. v. Press Co., 361, 487.
 Rockafellow v. Newcomb, 114, 250.
 Rockford, R. I. & St. L. R. Co. v. Shunick, 197.
 Rockford Watch Co. v. Manifold, 510.
 Rodecker v. Littauer, 271.
 Rodemeier v. Brown, 54.
 Rodgers v. Jones, 103.
 v. Levy, 494.
 v. Torrent, 365.

[The figures refer to pages.]

- Rodliff v. Dollinger, 200.
 Rodwell v. Phillips, 76.
 Roebeling's Sons' Co. v. Fence Co., 446.
 Roehl v. Haumesser, 88, 90, 500.
 Roehm v. Horst, 444.
 Roesner v. Hermann, 319.
 Rogers v. Allen, 399.
 v. Blackwell, 181, 186.
 v. Bollinger, 58.
 v. Burr, 408.
 v. Carey, 54.
 v. Hardware Co., 71.
 v. Higgins, 247.
 v. March, 517.
 v. Marriott, 278, 342.
 v. Pattie, 204.
 v. Phillips, 190.
 v. Rogers, 421.
 v. Sample, 272.
 v. Saunders, 495.
 v. Stone Co., 353.
 v. Van Nortwick, 495.
 v. Ward, 190, 191.
 v. Wolfe, 93.
 Rohan v. Hanson, 437.
 Rohman v. Gaiser, 356.
 Rohrof v. Schulte, 228.
 Roll v. Raguet, 293.
 Roller v. Ott, 307.
 Rollins v. Marsh, 128, 419-421.
 Rollins Inv. Co. v. George, 489.
 Roman v. Mali, 337, 340.
 Rommel v. Wingate, 442.
 Rood v. Jones, 124.
 Root v. Merriam, 335.
 Roper v. Johnson, 444.
 Roquemore v. Alloway, 330.
 Rorabacher v. Lee, 383.
 Roscorla v. Thomas, 138.
 Rose v. Daniels, 130.
 v. Duncan, 442.
 v. Mitchell, 330.
 v. Munford, 273, 274.
 v. Truax, 285.
 Rosema v. Porter, 492.
 Roseman v. Conovan, 222.
 Rosenbaum v. Credit System Co., 207,
 323-325.
 Rosenberg v. Block, 538.
 Rosenblatt v. Townsley, 269.
 Rosenfeld v. Swenson, 16.
 Rosenstock v. Tormey, 400.
 Ross v. Conway, 249.
 v. Doland, 198.
 Ross v. Hurd, 141.
 v. Miner, 222.
 v. Parks, 120.
 v. Welch, 76.
 Rosser v. Darden, 522.
 Rossiter v. Miller, 43.
 v. Rossiter, 513, 514.
 Rossman v. Townsend, 349.
 Rotheram Alum Co., In re, 353.
 Rothschild v. Mack, 230.
 Rottman v. Pohlmann, 68.
 Roughton v. Rawlings, 75.
 Rountree v. Smith, 342.
 Rousillon v. Rousillon, 307, 309.
 Routledge v. Grant, 33.
 Rovegno v. Defferari, 204.
 Row v. Dawson, 367.
 Rowe v. Barnes, 125.
 v. Moon, 356.
 v. Rand, 527, 529.
 v. Ware, 500.
 Rowell v. Oleson, 519.
 Rowland v. Bull, 274.
 Rowley v. Bigelow, 234, 238.
 v. Jewett, 480.
 v. Stoddard, 381.
 Royal Ins. Co. v. Beatty, 16.
 Roys v. Johnson, 326.
 Royston v. Miller, 197.
 Rucker v. Harrington, 426.
 Ruckman v. Bergholz, 260, 261.
 v. Bryan, 330.
 v. Ruckman, 54.
 Rudasill v. Falls, 507.
 Rudesill v. Jefferson County Court,
 481.
 Rudisill v. Cross, 74.
 Rue v. Meirs, 125.
 Ruff v. Jarrett, 229, 233, 469.
 Ruffner v. Hewitt, 508.
 Rugan v. Sabin, 236.
 Rugg v. Minett, 476.
 v. Moore, 455, 456.
 Ruiz v. Norton, 522.
 Rumbough v. Improvement Co., 394.
 Runde v. Runde, 69.
 v. Spencer, 166.
 Runge v. Brown, 232.
 Runt v. Herring, 318.
 Runyan v. Latham, 437.
 Runyon v. Snell, 501.
 Rupley v. Daggett, 204.
 Ruppe v. Edwards, 514.
 v. Peterson, 72.

[The figures refer to pages.]

Rush v. Rush, 266.
 v. Wick, 154.
 Russell v. Allerton, 405.
 v. Bell, 549.
 v. Kirkbride, 369.
 v. Mfg. Co., 28.
 v. Murdock, 269.
 v. Place, 493.
 v. Post, 330.
 v. Russell, 250.
 v. Stewart, 40.
 v. Wright, 125.
 v. Young, 407.
 Russ Lumber & Mill Co. v. Water Co.,
 225, 470.
 Rust v. Gott, 276.
 Rutherford v. McIvor, 543.
 Ryall v. Rowles, 367.
 Ryan v. Ashton, 249.
 v. School Dist., 264.
 v. U. S., 86, 87.
 Ryder, Ex parte, 159.
 In re, 548.
 v. Wombwell, 155, 156, 159.
 Ryer v. Stockwell, 38, 39.

S

Sable v. Maloney, 208.
 Safford v. Grout, 233.
 v. McDonough, 102.
 Sage v. Wilcox, 64, 87.
 Sails v. Miller, 514.
 St. Andrew v. Mfg. Co., 369.
 St. Joseph & D. C. R. Co. v. Ryan, 288.
 St. Joseph & G. I. R. Co. v. Palmer,
 319.
 St. Leger's Appeal, 249.
 St. Louis Agr. & Mech. Ass'n v. De-
 lano, 267.
 St. Louis Fair Ass'n v. Carmody, 328.
 St. Louis, Ft. S. & W. R. Co. v. Davis,
 130.
 St. Louis, I. M. & S. R. Co. v. O'Baugh,
 375.
 v. Ruddell, 55.
 St. Louis, J. & C. R. Co. v. Mathers,
 288.
 St. Louis, K. & N. W. R. Co. v. Clark,
 96.
 St. Louis, V. & T. H. R. Co. v. Railroad
 Co., 337.
 St. Paul & D. R. Co. v. Blackmar, 407.
 Sale v. Lambert, 84.

Salem India-Rubber Co. v. Adams,
 228.
 Salinas v. Bennett, 162.
 v. Stillman, 286.
 Salisbury v. Brisbane, 476.
 Salm v. Israel, 227.
 Salmon v. Boykin, 464.
 Salmon Falls Mfg. Co. v. Goddard, 84,
 89.
 Saltmarsh v. Smith, 528.
 Sampson v. Barnard, 481.
 v. Gazzan, 396.
 v. Shaw, 315.
 v. Townsend, 329.
 Sams v. Stockton, 156.
 Samuel v. Marshall, 180.
 Samuels v. Oliver, 315, 342.
 Sanborn v. Flagler, 85, 89, 105.
 v. Insurance Co., 63.
 v. Little, 369.
 v. Sanborn, 88.
 Sandage v. Mfg. Co., 261.
 Sandeen v. Railroad Co., 549.
 Sanders v. Bank, 131, 191.
 v. Bennett, 166.
 v. Carter, 107.
 v. Fruit Co., 29, 43.
 v. Johnson, 267.
 v. Smith, 122.
 Sanderson v. Piper, 396.
 Sandford v. Handy, 227, 514, 515.
 Sanford v. Bank, 412.
 Sands v. Sands, 248.
 Sandwich Mfg. Co. v. Earl, 493.
 Sanford v. Abrams, 132.
 v. Howard, 31.
 v. Kane, 274.
 v. Sornborger, 243.
 San Francisco Bridge Co. v. Improve-
 ment Co., 468.
 Santa Clara Valley Mill & Lumber Co.
 v. Hayes, 313, 322.
 Sapsford v. Fletcher, 534.
 Saratoga County Bank v. King, 323.
 Sarbecker v. State, 23, 103.
 Sard v. Rhodes, 435.
 Sarl v. Bourdillon, 105.
 Sarles v. Sharlow, 77.
 Sarwell v. Sowles, 96.
 Sasportas v. Jennings, 243.
 Sattler v. Hallcok, 403.
 Sault Ste. M., L. & I. Co. v. Simons, 33.
 Saunders v. Blythe, 55.
 v. Clark, 405.

[The figures refer to pages.]

- Saunders v. McClintock, 225, 233.
 v. Ott's Adm'r, 156.
 v. Whitcomb, 131.
 Saunderson v. Marr, 154.
 Savage v. Davis, 501.
 v. Gregg, 368.
 v. Lichtyter, 162.
 v. Savage, 483.
 Savannah Ice Delivery Co. v. Transit Co., 410.
 Saveland v. Green, 204.
 Saville v. Chalmers, 58.
 Saville, Simes & Co. v. Welch, 505, 538.
 Savings Bank v. Bank, 345.
 v. Mortgage Co., 429.
 Sawtelle v. Drew, 398.
 Sawyer v. Brossart, 29.
 v. Cutting, 501.
 v. Lufkin, 181.
 v. Mayhew, 277, 509.
 v. Prickett, 224.
 v. Tappan, 437.
 v. Ware, 98.
 Sax v. Railway Co., 79.
 Saxon v. Wood, 300.
 Sayer v. Wagstaff, 436, 437.
 Sayles v. Christie, 248.
 v. Smith, 266.
 Sayre v. King, 436.
 v. Nichols, 511.
 Sayward v. Dexter, Horton & Co., 356.
 v. Gardner, 85.
 Scales v. State, 266.
 Scanlan v. Keith, 520.
 Scanlon v. Cobb, 183.
 v. Warren, 279, 331.
 Scarborough v. Watkins, 249.
 Scarlett v. Stein, 410.
 Sceva v. True, 181, 530, 547.
 Schack v. Anthony, 521.
 Schaefer v. Henkel, 521.
 Schaller v. Railway Co., 20.
 Schamp v. Schenck, 297.
 Schaper v. Schaper, 198.
 Schaps v. Lehner, 183.
 Schenectady Stove Co. v. Holbrook, 31, 42.
 Schepflin v. Dessar, 522.
 Schermerhorn v. Vanderheyden, 356.
 Scheuer v. Goetter, 238.
 Schiffer v. Dietz, 236.
 v. Feagin, 516.
 Schilling v. Black, 384.
 Schilling v. Mullen, 366, 368.
 Schlesinger v. Stratton, 428.
 Schliess v. Grand Rapids, 433.
 Schlitz v. Meyer, 492.
 Schloss v. Hewlett, 283, 284.
 Schmalzing v. Thomlinson, 349, 351, 549.
 Schmalz v. Avery, 521.
 Schmidt v. Thomas, 102, 269.
 Schmueckle v. Waters, 275.
 Schneider v. Norris, 89.
 v. Staihr, 164.
 Schnell v. Nell, 115.
 Schoener v. Lissauer, 242.
 Schoenfeld v. Brown, 68.
 Schofield v. Walker, 247.
 Scholey v. Halsey, 537.
 v. Mumford, 244.
 School Directors v. Trefethren, 35.
 School Dist. No. 1 v. Dauchy, 473.
 School Dist. of Beatrice v. Thomas, 349, 356.
 Schooley v. Romain, 414.
 School Trustees v. Bennett, 473.
 Schoonover v. Vachon, 96.
 Schorestene v. Iselin, 38.
 Schroeder v. Fink, 124, 125.
 v. Loeber, 95.
 Schubart v. Coke Co., 233.
 Schuff v. Ransom, 185.
 Schuler v. Myton, 126.
 Schultz v. Catlin, 243, 245.
 v. Culbertson, 293.
 v. Noble, 65.
 v. Waldons, 75.
 Schulze-Berge v. The Guildhall, 319.
 Schumaker v. Mather, 228.
 Schurmeier v. Johnson, 494.
 Schuylkill Co. v. Copley, 197.
 Schwab v. Rigby, 269.
 Schwalm v. McIntyre, 481.
 Schwartz v. Schwartz, 241, 245.
 Schwarzbach v. Protective Union, 210, 215.
 Schweider v. Lang, 131, 492.
 Schwinger v. Hickok, 545.
 Scioto Fire Brick Co. v. Pond, 201.
 Scobey v. Ross, 298.
 Scofield v. Railroad Co., 289.
 Scoggin v. Slater, 75.
 Scotson v. Pegg, 129.
 Scott v. Avery, 295, 296.
 v. Brown, 257, 337.
 v. Buchanan, 166, 170.

[The figures refer to pages.]

- Scott v. Davis, 28.
 v. Fields, 409.
 v. Glenn, 89.
 v. Littledale, 205.
 v. McMillan, 376.
 v. Miller, 537.
 v. Rogers, 509.
 v. Sadler, 369.
 v. Scott, 169.
 v. Stetler, 375.
 v. White, 71.
 v. Whitney, 398.
 Scottish-American Mortg. Co. v. Davis, 26.
 Scribner v. Hollis, 399.
 Scrimshire v. Scrimshire, 344.
 Scroggin v. Wood, 225, 230, 390.
 Scudder v. Carter, 70, 218.
 Scully v. Kirkpatrick, 476, 550.
 Sea v. Carpenter, 508.
 Seagraves v. Alton, 192.
 Seaman v. Colley, 293.
 Seamans v. Temple Co., 345.
 Searcy v. Hunter, 163, 175.
 Searle v. Galbraith, 180.
 v. Hill, 95.
 Sears v. Brink, 87.
 v. Hicklin, 496.
 v. Railroad Co., 38.
 v. Shafer, 250.
 v. Starbird, 385, 534.
 Seaver v. Phelps, 183.
 Seavey v. Shurick, 400.
 Sebastian May Co. v. Codd, 436.
 Secomb v. Insurance Co., 400.
 Second Nat. Bank v. Grand Lodge, 354, 355.
 v. Steel Co., 520.
 Secor v. Clark, 244.
 Seculovich v. Morton, 495.
 Seddon v. Rosenbaum, 80.
 Sedgwick v. Stanton, 287.
 Seeberger v. McCormick, 518.
 Seebold v. Tatlie, 480.
 Seebolt v. Tatlie, 479.
 Seeger v. Duthie, 211.
 Seeley v. Traction Co., 203, 205.
 v. Welles, 432.
 Seeman v. Biemann, 412.
 Seery v. Socks, 512.
 Segar v. Edwards, 510.
 Seiber v. Price, 242.
 Seidenbender v. Charles' Adm'rs, 261, 333.
 Seigman v. Hoffacker, 356, 358.
 Seipel v. Insurance Co., 553.
 v. Trust Co., 449.
 Selden v. Myers, 251.
 Semmes v. Insurance Co., 147, 148, 474.
 v. Worthington, 94.
 Semple v. Pink, 123.
 Sennett v. Shehan, 552.
 Sentance v. Pool, 186.
 Senter v. Monroe, 518.
 v. Williams, 437.
 Sergeant v. Dwyer, 45.
 v. Stryker, 538.
 Seward v. Mitchell, 117.
 Sewell v. Sewell, 178.
 Sext v. Geise, 72.
 Seybold v. Morgan, 499.
 Seymour v. Armstrong, 28, 38, 397.
 v. Bridges, 343.
 v. Marlboro, 139.
 v. Marvin, 438.
 v. Minturn, 380, 419.
 v. Society, 194.
 v. Van Slyck, 437.
 Shackell v. Rosier, 259.
 Shackelton v. Seebree, 186.
 Shadburne v. Daly, 122.
 Shade v. Creviston, 367, 369.
 Shadwell v. Shadwell, 114, 129.
 Shady Hill Nursery Co. v. Waterer, 128.
 Shaeffer v. Blair, 508.
 Shafer v. Senseman, 303.
 Shaffer v. Hahn, 74.
 v. Mining Co., 365.
 Shahan v. Swan, 93.
 Shane v. Smith, 18, 553.
 Shanks v. Whitney, 225.
 Shannon v. Baumer, 339.
 v. Hoboken, 367.
 Sharkey v. Mansfield, 542.
 Sharp v. Carroll, 104.
 v. Jones, 516.
 v. Thompson, 406.
 Sharpe v. Rogers, 123.
 Sharpless' Appeal, 141.
 Shattock v. Shattock, 190.
 Shaw v. Andrews, 302.
 v. Ball, 179.
 v. Boyd, 173.
 v. Burney, 141.
 v. Carpenter, 323, 324.
 v. Clark, 279, 335.

[The figures refer to pages.]

- Shaw v. Glass Works, 42.
 v. Graves, 548.
 v. McCgregory, 424.
 v. Nudd, 500.
 v. Pratt, 491.
 v. Shaw, 92, 553.
 v. Thompson, 181.
 v. Williams, 514.
 Sheahan v. Barry, 448.
 Shed v. Pierce, 381.
 v. Woodcock, 540.
 Sheehy v. Adarene, 80.
 v. Fulton, 82.
 Sheeren v. Moses, 452.
 Sheets v. Bray, 180.
 v. Sweeney, 74.
 Sheffield v. Ladue, 518.
 Sheffield Canal Co. v. Railroad Co., 36.
 Sheffield Furnace Co. v. Coke Co., 120.
 Shelby v. Railroad Co., 58.
 Sheldon v. Capron, 202.
 v. Davidson, 224, 225.
 v. Haxtun, 275.
 Sheldon Hat-Blocking Co. v. Machine Co., 503, 505.
 Shelley v. Mikkelson, 452.
 Shelton v. Aultman & Taylor Co., 273.
 v. Ellis, 206.
 v. Jackson, 130.
 Shenandoah Val. R. Co. v. Dunlop, 58, 119.
 Sheneberger v. Insurance Co., 197.
 Shenk v. Mingle, 301.
 v. Phelps, 337.
 Shepard v. Carpenter, 42.
 v. Gaslight Co., 487.
 v. Rhodes, 109, 115, 138, 140.
 Shepherd v. Busch, 436.
 v. Jenkins, 469.
 v. Pressey, 102.
 Sherburne v. Shaw, 84.
 Sherley v. Peehl, 36.
 v. Riggs, 297.
 Sherman v. Brandt, 90.
 v. Kitsmiller, 44.
 v. Mulloy, 407.
 v. Sherman, 245.
 v. Wilder, 328.
 Sherwin v. Brigham, 126.
 v. Fletcher, 119.
 v. Sanders, 141.
 Sherwood v. Roundtree, 274.
 v. Stone, 71.
 v. Walker, 204.
 Shindler v. Houston, 102.
 Shipley v. Reasoner, 275.
 Shipman v. Horton, 164.
 v. Mining Co., 383.
 v. Seymour, 222.
 Shipp v. McKee, 166.
 Shippey v. Henderson, 141.
 Shippy v. Eastwood, 268.
 Shirk v. Shultz, 165, 173.
 Shirley v. Healds, 378.
 Shirts v. Overjohn, 199.
 Shively v. Black, 87.
 Shoninger v. Peabody, 505-507.
 Shook v. Vanmater, 71.
 Short v. Insurance Co., 215.
 v. Millard, 525.
 v. Mining Co., 264.
 v. Stone, 448.
 v. Stotts, 72.
 Shoulters v. Allen, 183.
 Shriner v. Lamborn, 368.
 Shropshire v. Burns, 168.
 Shubart's Estate, In re, 17.
 Shuder v. Newby, 123.
 Shuetze v. Bailey, 500.
 Shuey v. U. S., 36, 39.
 Shufeldt v. Pease, 239.
 Shultz v. Johnson, 476, 477, 550.
 Shumate v. Farlow, 80.
 Sibley v. Felton, 29, 43.
 v. Holcomb, 197.
 Sidenham v. Worlington, 138.
 Siebold v. Davis, 28.
 Siedenbender v. Charles' Adm'rs, 261.
 Siegel, Cooper & Co. v. Eaton & Prince Co., 473.
 Silberman v. Fretz, 453.
 Siler v. Gray, 477.
 Silsby v. Frost, 69.
 Silsby Mfg. Co. v. Chico, 432, 433.
 Silvers v. Potters, 391.
 Silverthorn v. Wylie, 139.
 Simar v. Canaday, 225.
 Simmons v. Clark, 491.
 v. Green, 459.
 v. Hamilton, 492.
 v. More, 518.
 Simmons Medicine Co. v. Simmons, 312.
 Simon v. Johnson, 398.
 v. Shoe Co., 230, 235.
 Simonds v. Heard, 517, 519.
 Simonton v. Bacon, 179.
 Simpson v. Carson, 526.

[The figures refer to pages.]

- Simpson v. Com.**, 90, 501.
 v. Crippin, 454, 455.
 v. Dix, 394.
 v. Evans, 126, 273.
 v. Garland, 519.
 v. Harris, 72.
 v. Hotel Co., 193.
 v. Krumdick, 101.
 v. Nichols, 269.
 v. Railway Co., 488.
- Simpson Centenary College v. Tuttle**, 119.
- Sims v. Clark**, 383.
 v. Everhardt, 166, 177.
 v. Ferrill, 226.
 v. Hutchins, 91, 553.
- Simson v. Brown**, 356.
- Sinclair v. Learned**, 441.
- Singer v. Schilling**, 239.
- Singerly v. Thayer**, 432.
- Singer Mfg. Co. v. Draper**, 337.
 v. Sammons, 238.
- Singleton v. Thomas**, 131.
- Singstack's Ex'rs v. Harding**, 90, 98.
- Sinsheimer v. Mfg. Co.**, 380.
- Sioux City Stock Yards Co. v. Packing Co.**, 420, 492.
- Sisson v. Baltimore**, 122, 132.
- Sivers v. Sivers**, 393, 494.
- Sizer v. Daniels**, 291.
- Skeate v. Beale**, 243.
- Skidmore v. Bradford**, 114.
- Skiff v. Johnson**, 329.
- Skinker v. Armstrong**, 70.
- Skinner v. Henderson**, 338.
 v. Maxwell, 171.
 v. Mining Co., 126.
 v. Somes, 363.
- Skipper v. Stokes**, 365.
- Skobis v. Ferge**, 366, 368.
- Skrainka v. Scharringhausen**, 313, 315.
- Slack v. Tucker**, 515.
- Slade v. Elevator Co.**, 132.
 v. Mutrie, 419.
 v. Rhodes, 298.
- Slade's Case**, 532.
- Slagle & Co. v. Goodnow**, 222.
- Slater v. Emerson**, 451.
 v. Jones, 133.
 v. Magraw, 415.
 v. Railroad Co., 429.
- Slaughter v. Davenport**, 382.
- Slaughter's Adm'r v. Gerson**, 219, 228.
- Slayton v. Barry**, 177.
- Sleeper v. Davis**, 239.
- Sleight v. Hartshorne**, 399.
- Sleigh v. Sleigh**, 535.
- Slingerland v. Slingerland**, 93.
- Slingsby's Case**, 384.
- Sloan v. Davis**, 294.
 v. Williams, 364.
 v. Wilson, 87.
- Slocum v. Wooley**, 290.
- Sloman v. Cox**, 483.
- Small v. Railroad Co.**, 300.
 v. Schaeffer, 356.
- Smalley v. Greene**, 80, 311.
- Smart v. Gale**, 545.
 v. Sanders, 527.
- Smeed v. Foord**, 487.
- Smiley v. Bell**, 364.
- Smith v. Algar**, 113.
 v. Alker, 477.
 v. Applegate, 291.
 v. Arthur, 58.
 v. Atwood, 242.
 v. Bank, 71, 392, 402.
 v. Banking Co., 446.
 v. Bartholomew, 419.
 v. Bean, 269.
 v. Beatty, 221.
 v. Bettger, 436.
 v. Blachley, 293.
 v. Black, 493.
 v. Bouck, 101.
 v. Bradley, 65.
 v. Brady, 431.
 v. Bromley, 341.
 v. Brown, 310.
 v. Bryan, 76.
 v. Burnham, 57.
 v. Coker, 124.
 v. Countryman, 223.
 v. Cuff, 340, 535.
 v. Davis, 217.
 v. Delaney, 70.
 v. Dunham, 482.
 v. Edwards, 23.
 v. Fisher, 102.
 v. Gowdy, 42.
 v. Greenlee, 258.
 v. Hale, 464.
 v. Harrison, 374.
 v. Hess, 398.
 v. Hornback, 235.
 v. Hudson, 101.
 v. Hughes, 200, 205, 224.
 v. Humphreys, 257, 301.

[The figures refer to pages.]

- Smith v. Ide, 105.
 v. Ingram, 15.
 v. Jernigan, 537.
 v. Jordan, 448.
 v. Kay, 250.
 v. Kidd, 505.
 v. Kittridge, 108.
 v. Lathrop, 493.
 v. Ledy, 307.
 v. Lewis, 447, 459.
 v. Lilley, 393.
 v. Livingston, 239.
 v. Loyd, 439.
 v. Mace, 483.
 v. Machine Co., 364.
 v. Mayo, 163, 167.
 v. Miller, 380.
 v. Molleson, 407.
 v. Monteith, 122.
 v. Morse, 120.
 v. Nichols, 50.
 v. Northrup, 87.
 v. Ocean Castle No. 11, 296.
 v. Phillips, 130.
 v. Pierce, 93.
 v. Plomer, 188.
 v. Porter, 55.
 v. Preston's Estate, 476.
 v. Price, 299.
 v. Property Co., 219.
 v. Railroad Co., 295, 429, 487.
 v. Railway Co., 266.
 v. Richards, 216, 218, 301.
 v. Robertson, 261, 264.
 v. Schiele, 74.
 v. Sherman, 378.
 v. Silvers, 273.
 v. Smith, 180, 222, 229, 276, 368, 528.
 v. Steely, 293.
 v. Surman, 76.
 v. Thompson, 190.
 v. Townsend, 302.
 v. Tracy, 524.
 v. Ulman, 258.
 v. U. S., 481.
 v. Ware, 117.
 v. Watson, 267, 418, 422.
 v. Weaver, 42, 119.
 v. Whildin, 127, 283.
 v. Wilcox, 267.
 v. Williamson, 187, 188.
 v. Wilson, 397.
 v. Wood, 60.
- Smith v. Wooding, 552.
 v. Wright, 398.
 Smith's Adm'r v. Smith, 236.
 Smith's Appeal, 89, 307, 308, 324.
 Smith Premier Typewriter Co. v. May-
 hew, 293.
 Smitz v. Leopold, 509.
 Smock v. Brush, 516.
 v. Pierson, 471.
 Smout v. Ilbery, 518.
 Smoyer v. Roth, 43.
 Smull v. Jones, 258.
 Smyley v. Reese, 249.
 Smythe v. Allen, 274.
 Snell v. Bray, 114.
 v. Cottingham, 487.
 v. Insurance Co., 207, 401.
 v. Stone, 501.
 Snelson v. State, 544.
 Snider v. Thrall, 103.
 Snoddy v. Bank, 335.
 Snodgrass v. Cabiness, 378.
 Snook v. Watts, 183.
 Snow v. Judson, 231.
 v. Perry, 514.
 v. Wheeler, 317.
 Snyder v. Church, 299.
 v. Insurance Co., 406.
 v. Jones, 60.
 Sobey v. Brisbee, 81.
 Solenberger v. Gilbert's Adm'r, 392.
 Solinger v. Earle, 341.
 Solomon v. Dreschler, 265.
 v. Penoyar, 518.
 Somerby v. Buntin, 101.
 Somers v. Pumphrey, 180.
 Somes v. Skinner, 179.
 Sondheim v. Gilbert, 335, 343.
 Soper v. Peck, 198.
 Sornborger v. Sanford, 246.
 Sorsbie v. Park, 416.
 Souhegan Nat. Bank v. Wallace, 338.
 Soule v. Bouney, 242.
 Southard v. Boyd, 287.
 v. Rexford, 488.
 South Baltimore Co. v. Muhlbach, 75.
 South Chicago City R. Co. v. Railway
 Co., 288.
 Southcombe v. Bishop, 495.
 Southern Development Co. v. Silva,
 224, 227.
 Southern Exp. Co. v. Duffey, 245.
 v. Glenn, 428.
 Southern Life Ins. Co. v. Lanier, 193.

[The figures refer to pages.]

- Southern Life Ins. Co. v. McCain, 526.
 Southern Life Ins. & Trust Co. v. Cole, 101.
 Southern Pac. Co. v. Well Works, 468.
 South Milwaukee Boulevard Heights Co. v. Harte, 228.
 Southwell v. Bowditch, 520.
 Southwick v. Bank, 239.
 Soutier v. Kellerman, 397.
 Sowers v. Parker, 227.
 Spackman v. Board, 296.
 Spader v. Mfg. Co., 475.
 Spads v. Barrett, 244.
 Spain v. Brent, 370.
 Spalding v. Ewing, 285, 420.
 v. Rosa, 476, 550.
 Spangler v. Danforth, 83.
 Sparks v. Pittsburgh Co., 29.
 Sparling v. Marks, 464.
 Spaulding v. Crawford, 245.
 Speake v. U. S., 483.
 Speed v. Hollingsworth, 228.
 Spence v. Ham, 431.
 v. Harvey, 287.
 v. Healey, 424.
 Spencer v. Brockway, 146.
 v. Field, 521.
 v. Harding, 38, 41.
 v. Parry, 535.
 v. Tilden, 272, 402.
 v. Towles, 111, 355.
 Spencer's Appeal, 249.
 Case, 373, 374.
 Speyer v. Desjardins, 75.
 Spiller v. Skating Rink, 353.
 Spinks v. Davis, 302.
 Spinney v. Hill, 96.
 Spinning v. Sullivan, 369.
 Spitze v. Railroad Co., 130.
 Spitzmiller v. Fisher, 18.
 Splane v. Com., 266.
 Spofford v. Hibbs, 506.
 Spragg v. Hammond, 541.
 Sprague v. Haines, 95, 96.
 v. Hazenwinkle, 439.
 Sprague Electric Co. v. Com'rs, 408.
 Sprankle v. Trulove, 360.
 Spring Co. v. Knowlton, 338.
 Springer v. Bien, 96.
 Sprye v. Porter, 298.
 Spurgeon v. McElwain, 265.
 Spurr v. Insurance Co., 401.
 Spycher v. Werner, 422.
 Squier v. Hydliff, 156.
 Staat v. Evans, 537.
 Stabler v. Cowman, 49, 52.
 Stacey v. Kemp, 269.
 Stackpole v. Symonds, 268.
 Stacy v. Cook, 131.
 v. Foss, 338, 339.
 Stafford v. Bacon, 138, 141.
 v. Roof, 163-165, 176.
 Stagg v. Compton, 28, 40.
 Staines v. Shore, 258.
 Stallings v. Gottschalk, 393.
 Stall's Estate, In re, 344.
 Stamford Bank v. Benedict, 439.
 Stamper v. Temple, 40, 41, 234.
 Standard Furniture Co. v. Van Alstine, 328.
 Standard Gaslight Co. v. Wood, 451.
 Standard Oil Co. v. Murray, 351.
 Stanford v. McGill, 447.
 Stange v. Wilson, 408.
 Stanley v. Dowdeswell, 29.
 v. Jones, 298.
 Stansfield v. Kunz, 338.
 Stanton v. Allen, 333.
 v. Embrey, 299.
 v. Hughes, 237.
 v. Willson, 159.
 Staples v. Bradbury, 528.
 v. Nott, 343.
 v. Wellington, 180.
 Starbird v. Cranston, 357, 358.
 Star Glass Co. v. Morey, 16.
 Stark v. Parker, 462.
 v. Sperry, 274.
 Starkie v. Perry, 17.
 Starks v. Sikes, 503.
 Starr v. Bennett, 206, 226.
 v. Wright, 152.
 Startup v. Macdonald, 434, 440.
 State v. Andriano, 146.
 v. Associated Press, 315.
 v. Baker, 107.
 v. Baldwin, 305.
 v. Board, 323-325.
 v. Boneil, 280.
 v. Boyd, 146, 147.
 v. Brantley, 245.
 v. Burkeholder, 145.
 v. Carver, 293, 294.
 v. Cass, 225, 230.
 v. Chandler, 380, 384.
 v. Clarke, 150.
 v. Corlies, 496.
 v. Dalton, 280.

[The figures refer to pages.]

- State v. Findley**, 322, 324.
 v. Glidden, 317.
 v. Gott, 59.
 v. Grant, 145.
 v. Howard, 158.
 v. Investment Co., 280.
 v. Judge, 266.
 v. McBee, 267.
 v. Matthis, 504.
 v. Moren, 280.
 v. Ohmer, 268.
 v. Oil Co., 313.
 v. O'Rourke, 266.
 v. Powell, 266.
 v. Railroad Co., 289, 337, 451, 475.
 v. Reigart, 108.
 v. Schuler, 268.
 v. Scougal, 260.
 v. Smith, 147.
 v. Sooy, 223.
 v. Sopher, 268.
 v. Stewart, 317.
 v. Such, 242.
 v. Temple, 145.
 v. Thompson, 52.
 v. Van Pelt, 484.
 v. Wallis, 391.
 v. Weatherwax, 151.
 v. Williamson, 284.
 v. Worthington's Ex'rs, 474.
State Bank v. Hastings, 284.
 v. McCoy, 188.
State Nat. Bank v. Bennett, 335.
 v. U. S., 541.
State of Louisiana v. New Orleans,
 531, 533.
Stavers v. Curling, 451, 465.
Stead v. Dawber, 65.
Steadman v. Guthrie, 87.
Steamboat Albatross v. Wayne, 396.
Stearns v. Dillingham, 537.
 v. Felker, 298.
 v. Hall, 65, 426.
 v. Johnson, 132.
Stebbins v. Bruce, 367.
 v. Duncan, 389.
 v. Niles, 242.
 v. Palmer, 378.
 v. Smith, 66.
Steeds v. Steeds, 425.
Steele v. Hobbs, 471.
 v. Lowry, 54.
 v. Steele, 114.
Steene v. Aylesworth, 356.
Steas v. Leonard, 473.
Steffes v. Lemke, 383.
Stein v. Swensen, 274.
Steinhauer v. Witman, 471.
Steinman v. Magnus, 131.
Stembridge v. Stembridge's Adm'r, 119.
Stensgaard v. Smith, 21, 33.
Stephens v. Board, 541.
 v. Davis, 480.
 v. Railway Co., 346.
Stephenson v. Cady, 456, 459.
 v. Elliott, 357.
 v. Insurance Co., 295.
Stepney v. Lloyd, 242.
Sterling v. Ryan, 422.
 v. Sinnickson, 303.
Stern v. Meikleham, 158.
Stetson v. Patten, 506.
Stettauer v. Hamlin, 402, 405.
Stevens v. Beals, 189.
 v. Benning, 365.
 v. Brennan, 239.
 v. Catlin, 381.
 v. Coon, 134.
 v. Flannagan, 358.
 v. Gourley, 265.
 v. Gregg, 346.
 v. Johnson, 470.
 v. Lee, 95.
 v. Ludlum, 218, 231.
 v. Parish, 188.
 v. Pierce, 237.
 v. Warren, 277.
Stevenson v. Crapnell, 56.
 v. Ewing, 264.
 v. McLean, 33, 35.
 v. Marble, 234.
Stewart v. Cattle-Ranch, 223.
 v. Eddowes, 90.
 v. Emerson, 222.
 v. Hidden, 419.
 v. Hopkins, 437.
 v. Jerome, 72.
 v. Keith, 437.
 v. Keteltas, 421.
 v. Langston, 133.
 v. Loring, 550.
 v. Marvel, 409.
 v. Mather, 510.
 v. Petree, 272.
 v. Railroad Co., 360.
 v. Railway Co., 324.
 v. Redditt, 180.
 v. Schall, 342.

[The figures refer to pages.]

- Stewart v. Stone, 476.
 v. Thayer, 326, 338.
 v. Trustees, 356.
 Stewart Paper Mfg. Co. v. Rau, 436.
 Stewartson v. Lothrop, 265.
 Stickley v. Insurance Co., 63.
 Stiernberger v. Gowdy, 439.
 Stiles v. McClellan, 89.
 v. Probst, 483.
 Stilk v. Meyrick, 127.
 Stillman v. Northrup, 274.
 Stines v. Dorman, 376.
 Stinson v. Anderson, 55.
 Stitt v. Huidekopers, 22, 33.
 Stix v. Roulston, 418.
 Stock v. Stoltz, 18.
 Stockett v. Watkins' Adm'rs, 16, 539.
 Stockham v. Stockham, 26.
 Stocks v. Dobson, 368, 370.
 Stockton v. Turner, 404.
 Stoddard v. Ham, 200.
 v. Martin, 276.
 v. Mix, 297.
 v. Penniman, 483.
 Stokes v. Anderson, 304.
 v. Baars, 455.
 Stone v. Browning, 105.
 v. Chamberlain, 423.
 v. Covell, 229.
 v. Dennison, 65.
 v. Denny, 229.
 v. Graves, 268.
 v. Harmon, 31.
 v. Hooker, 327.
 v. Marsh, 539.
 v. Seymour, 437, 439.
 v. Weiller, 241, 357.
 v. White, 481.
 v. Wilbern, 179.
 v. Wood, 517, 519.
 Stoneburner v. Motley, 137.
 Stoney v. Insurance Co., 214.
 Stoney Creek Woolen Co. v. Smalley, 227.
 Storer v. Gordon, 428.
 Storrs v. Barker, 206.
 v. Hospital, 299.
 Story v. Elliott, 266.
 v. Gammell, 229.
 v. Solomon, 280.
 v. Story, 18.
 Stotts v. Leonhard, 170.
 Stoudenmire v. Harper, 15.
 v. McLacln, 505.
 Stouffer v. Latshaw, 242.
 Stout v. Ennis, 282, 291.
 Stoutenburg v. Lybrand, 304.
 Stovall v. Com., 514.
 Stover v. Duren, 495.
 v. Mitchell, 244.
 Stow v. Russell, 420.
 Stowell v. Chamberlain, 494.
 Stowers v. Hollis, 78, 151, 152.
 Strachan v. Stock Exchange, 339.
 Strait v. Harrow Co., 313, 316.
 Strand v. Griffith, 228.
 Strangborough and Warner's Case, 117.
 Strasburg R. R. Co. v. Echternacht, 22.
 Strasser v. Conklin, 503.
 Stray v. Russell, 546.
 Streater v. Paxton, 383.
 Streeper v. Williams, 413.
 Street v. Blay, 463, 464, 540.
 v. Goodale, 357.
 v. Rigby, 295.
 Strehl v. D'Evers, 81.
 Streichen v. Fehleisen, 415.
 Strickland v. Graybill, 227.
 v. Turner, 201.
 Strobridge Lithographing Co. v. Randall, 43.
 Strong v. Clem, 371.
 v. Foote, 156.
 v. Grannis, 245.
 v. Lane, 203.
 v. Lawrence, 50.
 v. Railroad Co., 398, 400.
 v. Sheffield, 122.
 v. Strong, 233, 236.
 Strother's Adm'r v. Butler, 549.
 Stroud v. Smith, 283.
 Struthers v. Drexel, 271.
 Stuart v. Railroad Co., 23.
 v. Sears, 542, 543.
 Stuber v. Schack, 126.
 Studley v. Ballard, 127.
 v. Barth, 68.
 Studwell v. Shapter, 177.
 Stuht v. Sweesy, 139.
 Sturdivant v. Hull, 520.
 Sturges v. Robbins, 15.
 Sturm v. Boker, 408, 428.
 Sturtevant v. Sturtevant, 247.
 Styles v. F. R. Long Co., 358.
 Suber v. Chandler, 50.
 Suffell v. Bank, 479, 480.
 Sugart v. Mays, 398.

[The figures refer to pages.]

- Sullivan v. Ass'n, 271.
 v. Flynn, 183.
 v. Horgan, 323.
 v. Latimer, 41, 52.
 v. O'Neal, 94.
 v. Railroad Co., 268.
 v. Rudisill, 481, 483.
 v. Sullivan, 102, 141, 343.
 Summers v. Hibbard, Spencer, Bartlett & Co., 473.
 Sumner v. Jones, 269.
 v. Summers, 323.
 Sunderland v. Bell, 471.
 Sun Printing & Publishing Ass'n v. Moore, 413.
 Supreme Lodge v. Portingall, 382.
 Surles v. Pipkin, 181.
 Susquehanna Fertilizer Co. v. White, 397, 435.
 Sussex Peerage Case, 262.
 Sutch's Estate, In re, 108.
 Sutro v. Rhodes, 469.
 Sutton v. Beckwith, 403.
 v. Grey, 70.
 v. Head, 307, 308.
 v. Morgan, 228.
 v. Warren, 344.
 Suydam v. Jones, 373, 375.
 v. Westfall, 273.
 Swain v. Burnette, 91, 93.
 v. Schieffelin, 487, 488.
 v. Seamens, 65, 426, 427.
 Swales v. Jackson, 93.
 Swan v. Drury, 459.
 v. Nesmith, 71, 516.
 Swann v. Swann, 266, 267, 343.
 Swanson v. Kirby, 310.
 Swanstrom v. Balstad, 273.
 Swanzey v. Moore, 65.
 Swartwout v. Railroad Co., 288.
 Swasey v. Vanderheyden's Adm'r, 160.
 Swayne v. Riddle, 272.
 Swayze v. Hull, 291.
 Sweatland v. Telegraph Co., 321.
 Sweeney v. Insurance Co., 277.
 v. McLeod, 285.
 v. Thomason, 397.
 v. U. S., 460.
 Sweet v. Lumber Co., 77.
 Sweigart v. Berk, 380.
 Sweeney v. Davidson, 225.
 Swift v. Bennett, 158.
 Swift Co. v. U. S., 540.
 Swift Iron Works v. Dewey, 396.
 Swiney v. Swiney, 54.
 Swisshelm's Appeal, 249.
 Switzer v. Noffsinger, 367, 368.
 Syers v. Jonas, 463.
 Sykes v. Chadwick, 114.
 v. St. Cloud, 466.
 Sylvester v. Henrich, 230.
 Synge v. Synge, 448.
- T**
- Tacoma Coal Co. v. Bradley, 467.
 Taft v. Brewster, 517.
 v. Sergeant, 167.
 Taggart v. Tevanny, 96.
 Taintor v. Prendergast, 521, 522.
 Talbot v. Bowen, 497, 501.
 Talbott v. English, 493.
 v. Stemmons' Ex'r, 114.
 Talcott v. Henderson, 221, 222.
 Taliaferro v. Bank, 505.
 Tallman v. Coffin, 374.
 v. Franklin, 86.
 Talmage v. Bierhouse, 514.
 v. Pell, 328.
 Tamplin v. Jones, 205.
 Tanner v. Merrill, 132.
 Tansley v. Turner, 103.
 Tapley v. Butterfield, 500.
 v. Tapley, 240.
 Tardeveau v. Smith's Ex'r, 271.
 Tarrabochia v. Hickie, 211, 457, 466.
 Tasker v. Bartlett, 52.
 Tatam v. Reeve, 343.
 Tatlock v. Harris, 422.
 Tatterson v. Mfg. Co., 430.
 Tatum v. Kelley, 330.
 Taussig v. Hart, 510.
 Taylor v. Waters, 76.
 Tayloe v. Insurance Co., 25, 26, 30, 34.
 v. Sandiford, 410, 411, 437.
 Taylor, Ex parte, 174.
 v. Allen, 83, 86.
 v. Atchison, 198.
 v. Baldwin, 409.
 v. Bemiss, 299.
 v. Best, 146.
 v. Blanchard, 308.
 v. Bowers, 338.
 v. Brewer, 44.
 v. Caldwell, 475, 476.
 v. Carpenter, 147.
 v. Conner, 505, 507.

[The figures refer to pages.]

Taylor v. Cottrell, 242, 243.

- v. Deseve, 79.
- v. Fleckenstein, 229.
- v. Fleet, 203.
- v. Ford, 203.
- v. Gas Co., 264.
- v. Hall, 145.
- v. Hare, 546.
- v. Hiestand, 273.
- v. Higgins, 535.
- v. Laird, 18.
- v. Larkin, 494.
- v. Longworth, 462.
- v. Newspaper Co., 413.
- v. Nostrand, 518.
- v. Portington, 44.
- v. Pratt, 87.
- v. Railroad Co., 440.
- v. Rennie, 31.
- v. Ross, 87.
- v. Short, 236.
- v. Smetten, 280.
- v. Smith, 88, 102.
- v. Spears, 542.
- v. Taylor, 248, 355, 381.
- v. Turley, 402.
- v. Weeks, 124.
- v. Williams, 107.
- v. Young, 268.

Taymon v. Mitchell, 218.

Teachout v. Van Hoesen, 227, 237.

Teal v. Bilby, 421, 426, 460.

- v. Spangler, 436.

Teass v. St. Albans, 74.

Tecktonius v. Scott, 307.

Teegarden v. Lewis, 537.

Teeters v. Lamborn, 68.

Teipel v. Meyer, 119.

Telford v. Garrels, 273.

- v. Railroad Co., 288.

Temperton v. Russell, 350.

Temple v. Johnson, 93.

Templeton v. Wile, 42.

Tenant v. Elliott, 337.

- v. Tenant, 346.

Tennent-Stribling Shoe Co. v. Roper, 269.

Tennessee Mfg. Co. v. James, 412.

Terre Haute & I. R. Co. v. Stockwell, 505.

Territt v. Bartlett, 262, 265, 330, 344.

Terry v. Bissell, 469.

Terwilliger v. Murphy, 518.

Tewksbury v. Howard, 85.

Tewksbury v. Spruance, 510.

Texas & P. R. Co. v. Smith, 320.

Texas & St. L. R. Co. v. Robards, 288.
v. Rust, 412.

Textor v. Hutchings, 447.

Thacher v. Hardy, 343.

- v. Pray, 541.

Thacker v. Hardy, 278, 279, 334.

- v. Howell, 395.

Thackrah v. Haas, 187.

Thallhimer v. Brinckerhoff, 297, 298,
300, 365.

Thames v. Jones, 359.

Thatcher v. St. Andrew's Church, 54.

Thayer v. Brackett, 442.

- v. Burchard, 119, 120.

- v. Daniels, 367, 370.

- v. Elliott, 346.

- v. Kelley, 365.

- v. Knote, 205.

- v. Luce, 88.

- v. Rock, 322.

- v. Viles, 58.

Thing v. Libbey, 167.

Third Nat. Bank v. Harrison, 279.

- v. Railroad Co., 369.

Thomas v. Armstrong, 78.

- v. Atkinson, 523.

- v. Bartow, 208.

- v. Bland, 375.

- v. Cadwallader, 450.

- v. Caulkett, 257, 292.

- v. Coal Co., 16, 25.

- v. Cook, 70.

- v. Cronise, 276.

- v. Dike, 176.

- v. Evans, 442.

- v. Greenwood, 27, 29.

- v. Haywood, 374.

- v. Hunter, 267.

- v. Miles' Adm'r, 308, 324.

- v. Miller, 273.

- v. Railroad Co., 193, 289.

- v. Richmond, 341.

- v. Thomas, 107, 109.

- v. Todd, 435.

Thomas B. & W. Mfg. v. Railway Co., 487.

Thomas' Ex'x v. Trustees, 89, 124.

Thomas Mfg. Co. v. Prather, 356, 357.

Thomason v. Dayton, 58.

Thompson v. Alger, 104.

- v. Blanchard, 65, 87.

- v. Brannin, 396.

[The figures refer to pages.]

- Thompson v. Brown, 424.
 v. Davenport, 520.
 v. Gaffey, 468.
 v. Gould, 201, 476.
 v. Hamilton, 163, 398.
 v. Hawks, 249.
 v. Howard, 539.
 v. Hudgins, 141.
 v. Lay, 167.
 v. Leach, 182.
 v. Lee, 218.
 v. Libby, 467.
 v. Lockwood, 242, 245.
 v. McKee, 393.
 v. Mfg. Co., 470.
 v. Niggley, 246.
 v. Peck, 237.
 v. Percival, 423.
 v. Reynolds, 296, 298.
 v. Rose, 239.
 v. Smith, 57.
 v. Stevens, 44.
 v. Stewart, 394, 513.
 v. Taylor, 343, 345.
 v. Warren, 188, 298.
 v. Whitman, 293.
 Thomson v. Beal, 403.
 v. Gortner, 43, 44.
 v. James, 26.
 v. Poor, 421, 425.
 Thormaehlen v. Kaepfel, 166, 178.
 Thorn v. Knapp, 488.
 v. Pinkham, 243.
 v. Smith, 231.
 Thornborow v. Whiteacre, 134.
 Thorndike v. Stone, 272.
 Thorne v. Deas, 111, 498.
 v. Yontz, 286, 335.
 Thornell v. Brockton, 395.
 Thornett v. Haines, 540.
 Thornhill v. Neats, 421.
 Thornton v. Appleton, 482, 483.
 v. Kelly, 84.
 v. Kempster, 202.
 v. Railroad Co., 407.
 v. Strauss, 537.
 v. Sturgis, 19.
 v. Wynn, 464.
 Thoroughgood's Case, 197.
 Thorp v. Thorp, 344.
 Thorpe v. Thorpe, 450.
 Thrall v. Newell, 405.
 v. Thrall, 218.
 Thrift v. Payne, 462.
 Thruston v. Thornton, 13, 22, 38, 40.
 Thum Co. v. Tloczynski, 312.
 Thurman v. Burt, 244.
 Thurston v. Arnold, 409.
 v. Blanchard, 235.
 v. Ludwig, 426.
 v. Mills, 537.
 v. Minke, 376.
 Thwing v. Lumber Co., 201.
 Tibbetts v. Gerrish, 141.
 Tibbits v. George, 368.
 Tice v. Freeman, 86.
 Tichnor v. Hart, 19.
 Tiddy v. Harris, 130.
 Tier v. Lampson, 502, 526.
 Tightmeyer v. Mongold, 539.
 Tilley v. Ass'n, 271.
 v. Damon, 242.
 Tillier v. Whitehead, 499.
 Tillinghast v. Boothby, 311.
 Tillock v. Webb, 268, 269.
 Tillon v. Britton, 441.
 Tillotson v. Grapes, 471.
 v. Prichard, 375.
 Timmerman v. Dever, 311.
 Timothy v. Wright, 286.
 Tingle v. Fisher, 367, 370.
 Tingley v. Boom Co., 89.
 v. Land Co., 420.
 Tinn v. Hoffman, 21, 31, 36.
 Tisdale v. Harris, 100.
 Tisher v. Beckwith, 53.
 Titcomb v. Vantyle, 180.
 Tobey v. Robinson, 323.
 v. Wood, 162.
 Tobias v. Lissberger, 464.
 v. Rogers, 534.
 Tobin v. Bass, 54.
 Todd v. Clapp, 162.
 v. Grove, 250.
 v. Huntington, 431.
 v. Stewart, 50.
 v. Stokes, 375.
 v. Weber, 356.
 Tode v. Gross, 312.
 Toland v. Corey, 206.
 v. Murray, 517.
 Toledo Sav. Bank v. Rathmann, 470.
 Toledo W. & W. R. Co. v. Chew, 549.
 Tolhurst v. Powers, 124.
 Tolman Co. v. Reed, 344.
 Tolson's Adm'r v. Garner, 180.
 Tomkinson v. Straight, 102.
 Tompkins v. Batie, 442.

[The figures refer to pages.]

- Tompkins v. Hill, 132, 492.
 Tone v. Shankland, 367.
 v. Wilson, 218.
 Tool Co. v. Norris, 286, 287.
 Topeka Water Supply Co. v. Root, 183.
 Topham v. Roche, 514.
 Topliff v. McKendree, 41.
 v. Topliff, 407.
 Topp v. White, 471.
 Topping v. Bickford, 192.
 v. Swords, 42.
 Tornado, The, 475.
 Torrence v. Shedd, 296.
 Torrey v. U. S., 145.
 Totten v. U. S., 390.
 Touche v. Warehousing Co., 353.
 Toussaint v. Martinant, 534.
 Touro v. Cassin, 344.
 Towle v. Dresser, 154, 164.
 v. Larrabee, 266.
 v. Leavitt, 513-515.
 v. Wadsworth, 75.
 Townner v. Lucas' Ex'r, 393.
 Town of Brandon v. Jackson, 132.
 Town of Eagle v. Kohn, 335.
 Town of Grand Isle v. Kinney, 119.
 Town of Hamden v. Merwin, 45.
 Town of Meredith v. Ladd, 282.
 Town of Royalton v. Turnpike Co., 405.
 Town of Rutland v. Page, 52.
 Town of Sharon v. Gager, 242.
 Town of Thetford v. Hubbard, 282.
 Townsend v. Cowles, 207, 226, 544.
 v. Crowley, 542, 543.
 v. Hargrave, 91, 92, 101, 103, 105.
 v. Minford, 81.
 v. Rackham, 357.
 v. Vanderwerker, 93, 94.
 v. Wagon Co., 480.
 Tracey v. Sacket, 251.
 Tracy v. Keith, 188.
 v. Talmage, 329, 330, 340.
 Trader v. Jarvis, 152.
 v. Lowe, 167.
 Traders' Bank v. Alsop, 335.
 Traders' Nat. Bank v. Parker, 123, 175.
 Tradesman's Bank v. Green, 367.
 Traill v. Baring, 218.
 Train v. Gold, 15, 107, 111.
 Trainer v. Trumbull, 157, 159, 160, 547.
 Trambly v. Ricard, 198.
 Trammell v. Vaughan, 444.
 Trasher v. Everhart, 52, 53.
 Trask v. Vinson, 471.
 Traver v. —, 107, 113.
 Travers v. Crane, 528, 529.
 Travis v. Insurance Co., 32.
 Treadwell v. Tobert, 293.
 Treat v. Hiles, 75, 78.
 Tredway v. Riley, 344.
 Trentman v. Wahrenburg, 307.
 Trenton Mut. Life & Fire Ins. Co. v. Johnson, 276, 277.
 Trenton Potteries Co. v. Oliphant, 309, 310, 313, 315, 415.
 Trenton Terra Cotta Co. v. Shingle Co., 401.
 Tretheway v. Hulett, 236.
 Trevor v. Wood, 26, 27, 30, 83.
 Trigg v. Read, 207, 208, 544.
 Trimble v. Thorson, 501.
 Trimbo v. Trimbo, 179.
 Trine, Appeal of, 271.
 Tripp v. Brownell, 366.
 Trist v. Child, 285, 286, 323.
 Troeder v. Hyams, 389.
 Tronson v. University, 452.
 Trotter v. Heckscher, 455.
 Trounstone v. Sellers, 22, 30.
 Troup v. Appleman, 236.
 Trout v. Emmons, 513.
 Troutman v. Lucas, 492.
 Trower v. Elder, 412, 414.
 Troy v. Bland, 543.
 Troy Fertilizer Co. v. Logan, 45.
 Troy & G. R. Co. v. Com., 145.
 Truax v. Miller, 132.
 Truby v. Mosgrove, 271, 272.
 Trudo v. Anderson, 513.
 True v. Telegraph Co., 487.
 Trueblood v. Trueblood, 154, 505.
 Trueman v. Fenton, 140.
 v. Loder, 85.
 Truett v. Wainwright, 480.
 Trundle's Adm'r v. Riley, 283, 284.
 Truscott v. King, 439.
 Trustees of Christian Church of Wolcott v. Johnson, 192.
 Trustees of Cincinnati Tp. v. Ogden, 192.
 Trustees of Columbia College v. Lynch, 376.
 Trustees of Columbia College v. Thacher, 376.
 Trustees of First Baptist Church v. Bigelow, 90.

[The figures refer to pages.]

- Trustees of First Orthodox Congrega-
 tional Church v. Walrath, 414.
 Trustees of Maine Cent. Inst. v. Has-
 kell, 119.
 Trustees of Troy Conference Academy
 v. Nelson, 118.
 Tuck v. Downing, 219, 227.
 Tucker v. Bartle, 126.
 v. Cocke, 188.
 v. Lawrence, 32, 526.
 v. Moreland, 150, 152, 154, 170,
 173.
 v. Mowray, 269.
 v. Smith, 399.
 v. Woods, 21, 35, 118.
 Tuckerman v. Hinkey, 268
 v. Newhall, 382.
 Tucker Mfg. Co. v. Fairbanks, 520.
 Tufts v. Mining Co., 83.
 Tulk v. Moxhay, 376.
 Tullett v. Armstrong, 190.
 Tuoro v. Cassin, 546.
 Tupper v. Cadwell, 158, 159.
 Turlington v. Slaughter, 140, 142.
 Turnbull v. Brock, 126, 130.
 Turner v. Egerton, 533, 534.
 v. Frisby, 158, 548.
 v. Gaither, 156.
 v. Hubbell, 67.
 v. Insurance Co., 504.
 v. Mason, 100.
 v. Owen, 127.
 v. Plowden, 493.
 v. Rusk, 184.
 v. Thompson, 339.
 v. Webster, 547.
 Tuscaloosa Ice Mfg. Co. v. Williams,
 315.
 Tutt v. Brown, 522.
 v. Ide, 244.
 Tuttle v. Armstead, 70, 534.
 v. Campbell, 537.
 v. Love, 21.
 Tweddle v. Atkinson, 352, 353.
 Tweeddale v. Tweeddale, 358.
 Tweedie Trading Co. v. James P. Mc-
 Donald Co., 474.
 Twenty-Third St. Baptist Church v.
 Cornell, 119.
 Twitchell v. Bridge, 218.
 Tyler v. Ass'n, 130.
 v. Carlisle, 330, 331, 338, 339.
 v. Fleming, 150, 169.
 v. Telegraph Co., 320.
 Tyler v. Waddington, 268.
 v. Young, 471.
 Tyler Cotton Press Co. v. Chevallier,
 130.
 Tynan v. Dullnig, 90.
 Tysen v. Somerville, 424.
 Tyson v. Passmore, 216.
 v. Rickard, 270, 274.
- U**
- Udell v. Atherton, 524.
 Ueberroth v. Riegel, 22.
 Uecker v. Koehn, 168, 171.
 Uhler v. Applegate, 268.
 Uhlig v. Barnum, 421.
 Ullman v. Ass'n, 339.
 Ullmann v. Railway Co., 403.
 Ulmer v. Farnsworth, 397.
 Ulrich v. Arnold, 41.
 Underwood v. Barker, 309.
 v. Brockman, 226.
 v. Dollins, 52.
 v. Lewis, 476.
 v. Scott, 264.
 v. Wolf, 421, 469.
 Unger v. Boas, 335.
 Ungericht v. State, 268.
 Union Bank v. Coster's Ex'rs, 24.
 v. Jacobs, 193.
 Union Cent. Life Ins. Co. v. Berlin,
 322.
 v. Hilliard, 151, 271.
 v. Schidler, 235, 237.
 Union Hardware Co. v. Mfg. Co., 194.
 Union Locomotive & Express Co. v.
 Railway Co., 324.
 Union Mut. Ins. Co. v. Kirchhoff, 58.
 Union Mut. Life Ins. Co. v. Hanford,
 354.
 Union Nat. Bank v. Baldenwick, 435.
 v. Miller, 30.
 v. Railroad Co., 262.
 v. Roberts, 480.
 Union Pac. R. Co. v. Anderson, 132.
 v. Durant, 354.
 v. McAlpine, 94.
 v. Rainey, 319.
 Union Railway Storage Co. v. McDer-
 mott, 357.
 Union Strawboard Co. v. Bonfield, 308.
 U. S. v. Ass'n, 313.
 v. Bainbridge, 151.
 v. Behan, 449, 468, 488.

[The figures refer to pages.]

U. S. v. Blakeney, 152.
 v. Bradley, 322, 324.
 v. Charles, 201.
 v. Clarke, 145.
 v. Cumming, 145.
 v. E. C. Right Co., 313.
 v. Grossmayer, 147.
 v. Hodgson, 324.
 v. Holmes, 146.
 v. Huckabee, 240, 241, 243.
 v. Ingate, 145.
 v. Kirkpatrick, 439.
 v. Lane, 145.
 v. Mora, 324.
 v. Morgan, 435.
 v. Northern Securities Co., 314.
 v. Price, 384.
 v. Railroad Co., 405.
 v. Rodgers, 345.
 v. Spalding, 482.
 v. Tingey, 145.
 United States Fire & Marine Ins. Co.
 v. Kimberly, 214.
 United States Mortgage Co. v. Hen-
 derson, 125, 177, 505, 722.
 Universal Fashion Co. v. Skinner,
 390.
 Updike v. Ten Broeck, 78.
 Updyke v. Titus, 109.
 Up River Ice Co. v. Denler, 310, 364.
 Upson v. Holmes, 76.
 Upton v. Tribilcock, 198, 207, 226.
 Upton Mfg. Co. v. Huiske, 464.
 Urmston v. Whitelegg, 306, 313.
 Urquhart v. Mortgage Co., 485.
 Usher v. McBratney, 290.
 Utley v. Donaldson, 28, 29, 426.

V

Vahlberg v. Keaton, 273.
 Vail v. Durant, 516.
 Vale v. Insurance Co., 214.
 Valentine v. Bell, 141.
 v. Foster, 109.
 v. Piper, 389.
 Valentini v. Canali, 174.
 Vallandingham v. Johnson, 170.
 Vallett v. Parker, 335.
 Valley Ry. Co. v. Iron Co., 544.
 Valpy v. Sanders, 539.
 Van Alen v. Vanderpool, 515.
 Van Alstyne v. Van Slyck, 415.
 Van Atta v. McKinney's Ex'rs, 149.

Van Bramer v. Cooper, 162.
 Van Brunt v. Eoff, 482, 483.
 v. Singley, 198.
 Van Campen v. Ford, 123.
 Vance v. Funk, 52.
 v. Lowther, 480.
 v. Word, 176.
 Van Clief v. Van Vechten, 431.
 Vanderbeck v. Rochester, 544.
 v. Vanderbeck, 419.
 Vanderbilt v. Schreyer, 127, 128.
 Van Deusen v. Blum, 547.
 v. Sweet, 181.
 Van Dusen v. Mining Co., 526.
 Van Gorder v. Bank, 122.
 Van Horn v. Hann, 181.
 v. Keenan, 187.
 v. Kittitas County, 292.
 v. Van Horn, 350.
 Van Houten v. Morse, 223.
 Van Hoven v. Irish, 269.
 Van Keuren v. Corkins, 368.
 Van Leyen v. Wreford, 380.
 Vannoy v. Patton, 265.
 Van Patton v. Beals, 184.
 Van Santen v. Oil Co., 535.
 Van Schaick v. Edwards, 344.
 v. Van Buren, 44.
 Van Syckel v. O'Hearn, 425.
 Van Trotha v. Bamberger, 75.
 Van Valkenburg v. Rogers, 22.
 Van Valkenburgh v. Smith, 59.
 Van Valkinburgh v. Watson, 159, 548.
 Van Vleet v. Sledge, 343.
 Van Vleit v. Jones, 58.
 Van Wyck v. Brasher, 187.
 Varney v. Conery, 131, 492.
 v. French, 266.
 Varnum v. Hygate, 201.
 v. Thruston, 406.
 Vassar v. Camp, 26, 27, 30.
 Vasse v. Smith, 178.
 Vaughan v. Godman, 54.
 v. Porter, 405.
 Vaught v. Rider, 275.
 Vawter v. Baker, 517.
 v. Griffin, 100.
 Veach v. Thompson, 246.
 Veal v. Fortson, 163.
 Veazey v. Allen, 285.
 Veazie v. Williams, 238.
 Vehue v. Pinkham, 164, 175.
 Venezuela R. Co. v. Kisch, 216.
 Vennum v. Gregory, 508.

[The figures refer to pages.]

- Vent v. Osgood, 150, 153, 164, 170, 175.
 Vermont Loan & Trust Co. v. Hoffman, 261.
 Vickery v. Welch, 312.
 Vilas v. Downer, 149.
 Vilett v. Moler, 227.
 Village of Port Jervis v. Bank, 535.
 Vinal v. Improvement Co., 207.
 Vincent v. Germond, 101.
 Viney v. Rignold, 295.
 Vinton v. Baldwin, 508.
 Vinz v. Beatty, 269.
 Violet v. Patton, 87.
 v. Powell's Adm'r, 84, 85.
 Viollette v. Rice, 392.
 Virginia Hot Springs Co. v. Harrison, 28.
 Vischer v. Yates, 276, 291.
 Viser v. Bertrand, 304, 331.
 Vittum v. Estey, 444.
 Vogle v. Ripper, 483.
 Vogt v. Hecker, 473.
 Volk v. Stowell, 477.
 Voluntary Relief Department v. Spencer, 295.
 Volz v. Grummett, 409.
 Von Brandenstein v. Ebensberger, 124.
 Vooght v. Winch, 50.
 Vos v. Robinson, 398.
 Vosburgh v. Diefendorf, 335.
 Vose v. Insurance Co., 215.
 Vought v. Williams, 460.
 Vreeland v. Stone Co., 232.
 Vrooman v. McKaig, 537.
 v. Turner, 357.
- W**
- Wabash Val. Prot. Un. v. James, 237.
 Waddy Bluegrass Creamery Co. v. Mfg. Co., 416.
 Wade v. Kalbfleisch, 7, 378.
 v. Pulsifer, 249.
 v. Simeon, 124.
 Wadhams v. Page, 423.
 Wadleigh v. Sutton, 551.
 Wadsworth v. Sharpsteen, 187.
 v. Wendell, 52.
 Wager v. Wagoner, 183.
 Waggoner v. Gray's Adm'rs, 69.
 Wagner v. Breed, 343.
 v. Hildebrand, 278.
 v. Insurance Co., 233.
 v. J. & G. Meakin, 119.
 Wahl v. Barnum, 78.
 Wailing v. Toll, 155, 157.
 Wain v. Warlters, 87.
 Wainer v. Insurance Co., 105.
 Wainwright v. Wilkinson, 154.
 Wait v. Baker, 103.
 v. Maxwell, 182.
 v. Pomeroy, 479, 480.
 v. Wait's Ex'r, 69.
 Waite v. Leggett, 16, 543.
 v. Merrill, 546.
 Wake v. Harrop, 388, 394.
 Wakefield v. Brown, 394.
 Wakeman v. Mfg. Co., 488.
 Walden v. Insurance Co., 214.
 Waldron v. Murphy, 442.
 Wales v. Stout, 66.
 Walker v. Abt, 272.
 v. Bank, 380.
 v. Barron, 398.
 v. Brooks, 364.
 v. Brown, 16.
 v. Conant, 538, 543.
 v. Cronin, 350.
 v. Denison, 430, 526.
 v. Douglas, 403.
 v. Duncan, 549.
 v. Ebert, 198.
 v. Edward Thompson Co., 432.
 v. Emerson, 495.
 v. France, 394.
 v. Gregory, 300.
 v. Haggerty, 507.
 v. Henry, 141.
 v. Herring, 515.
 v. Jeffries, 330.
 v. Johnson, 80.
 v. Lovell, 324.
 v. McCulloch, 381.
 v. Nussey, 104.
 v. Perkins, 300, 345.
 v. Perryman, 298.
 v. Railroad Co., 78.
 v. Shackelford, 96.
 v. Skipwith, 514.
 v. Smith, 111.
 v. Supple, 101.
 v. Tucker, 475.
 v. Walker, 54, 303.
 Wall v. Railroad Co., 35.
 v. Schneider, 280.
 v. Wall, 54, 55.
 Wallace v. Harris, 247.
 v. Jewell, 481.

[The figures refer to pages.]

- Wallace v. Lawyer, 503.
 v. Morgan, 398.
 v. Morss, 177.
 v. Railway Co., 229.
 v. Rappleye, 300, 301.
 v. Scoggin, 94.
 v. Tice, 483.
 v. Townsend, 37.
 Wallace's Lessee v. Lewis, 169, 170.
 v. Miner, 58.
 Waller v. Cralle, 244.
 Wallis v. Bardwell, 158.
 v. Carpenter, 383, 412.
 Wall's Appeal, 44.
 Walls v. Bailey, 399.
 Walpole v. Bridges, 429.
 Walsh v. Ass'n, 39, 441.
 v. Featherstone, 356.
 v. Fisher, 476.
 v. Morse, 229.
 v. Trevanion, 403.
 Walter v. Foutz, 274.
 v. Victor G. Bloede Co., 65.
 Walter A. Wood Mach. Co. v. Gaertner, 393.
 Walters v. Eaves, 230.
 Walton v. Black, 455.
 v. Burton, 54.
 v. Hastings, 480.
 Walton Plow Co. v. Campbell, 483.
 Wamble v. Foote, 154.
 Wamsley v. Lindenberger, 153.
 Wanmaker v. Van Buskirk, 495.
 Wann v. McNulty, 478.
 Wanner v. Landis, 390.
 Wuples v. Hastings, 154.
 Ward v. Anderson, 169.
 v. Armstrong, 217, 248, 249.
 v. Building Co., 411, 412.
 v. Hackett, 481.
 v. Hobbs, 224.
 v. Hollins, 134.
 v. Johnson, 380, 383.
 v. Laverty, 166.
 v. Matthews, 80, 409.
 v. Morrison, 370.
 v. Vance, 475.
 v. Vosburgh, 343.
 v. Ward, 267.
 Wardell v. Fosdick, 235.
 v. Williams, 42.
 Warder, Bushnell & Glessner Co. v. Whitish, 228.
 v. Willyard, 483.
 Ware v. Allen, 70, 392.
 v. Cartledge, 154.
 v. Chappell, 450, 451.
 v. Curry, 324.
 v. Wisner, 146, 147.
 Warfield v. Booth, 308.
 Waring v. Mason, 85, 90.
 Warner v. Martin, 511.
 v. Railway Co., 77, 79.
 v. Willoughby, 72.
 Warnock v. Campbell, 186.
 v. Davis, 277.
 Warren v. Abbott, 70.
 v. Bank, 366.
 v. Costello, 119.
 v. Hodge, 126.
 v. Lynch, 52, 53.
 v. Wheeler, 433.
 Warren Chemical & Mfg. Co. v. Holbrook, 77.
 Warring v. Williams, 484.
 Warrington v. Early, 481.
 Warwick v. Cooper, 154.
 Washaw v. Gimble, 305.
 Washbourn v. Burrows, 76.
 Washburn v. Dosch, 80, 307.
 v. Fletcher, 26.
 v. Investment Co., 356.
 Washington v. Johnson, 428.
 Washington, A. & G. Steam Packet Co. v. Sickles, 79.
 Washington Brewery Co. v. Carry, 93.
 Washington Cent. Imp. Co. v. Newlands, 228.
 Washington Mills Mfg. Co. v. Insurance Co., 215.
 Washington Nat. Building, Loan & Investment Ass'n v. Stanley, 271, 344.
 Washington Natural Gas Co. v. Johnson, 437.
 Washington University v. Finch, 148.
 Wassermann v. Sloss, 338.
 Watchman v. Crook, 465.
 Waterbury v. Andrews, 231.
 v. Egan, 264.
 Waterman v. Andrews, 406.
 v. Banks, 410.
 v. Merrow, 367.
 Waters v. Bean, 141.
 v. Mattingley, 223, 224.
 v. Shafer, 68.
 v. Tompkins, 496.
 v. Trust Co., 118.

[The figures refer to pages.]

- Waters v. White, 121, 122.
 Watkins v. Baird, 242.
 v. Brant, 249.
 v. De Armond, 499.
 v. Hodges, 421.
 v. Rymill, 20.
 v. Watkins, 7.
 Watson v. Bagaley, 367.
 v. Baker, 216.
 v. Blaine, 404.
 v. Blossom, 135.
 v. Brown, 203.
 v. Cresap, 545.
 v. Cross, 155, 158.
 v. Doyle, 115.
 v. Inhabitants, 487.
 v. King, 529.
 v. Mahan, 249.
 v. Randall, 69.
 v. Sherman, 90, 500.
 v. Turner, 140.
 Watson's Ex'rs v. McLaren, 87.
 Watt v. Cranberry Co., 84, 85.
 Watte v. Wickersham, 280.
 Watters v. McGuigan, 74.
 Watts v. Camors, 411, 414.
 v. Frenche, 126, 130.
 v. Van Ness, 266.
 v. Weston, 486.
 v. Witt, 94.
 Waugh v. Beck, 331.
 v. Cope, 438.
 v. Morris, 326.
 Way v. Langley, 257.
 v. Sperry, 140.
 Waydell v. Luer, 423.
 Wayman v. Wayman, 18.
 Waymell v. Reed, 329.
 Wayne Co. v. Randall, 544.
 Wead v. Larkin, 375.
 Weare v. Gove, 518.
 Weatherby v. Smith, 273.
 Weaver v. Burr, 30, 33, 36.
 v. Harlan, 339.
 v. Jones, 151, 153.
 v. Whitney, 283, 284.
 Webb v. Buckelew, 494.
 v. England, 490.
 v. Railroad Co., 100.
 v. Steele, 362.
 v. Stephenson, 448.
 Webber v. Bridgman, 528.
 v. Donelly, 330.
 v. Howe, 346.
 Weber v. Barrett, 243, 294.
 v. Christen, 54.
 v. Shay, 293.
 v. Squier, 486.
 Webster v. Anderson, 103.
 v. Brown, 85.
 v. Cecil, 205, 208, 400, 490.
 v. Fleming, 357, 358.
 v. Gray, 93.
 v. Le Compte, 65, 141.
 v. Munger, 329, 345.
 v. Woodford, 179.
 Weed v. Adams, 516.
 v. Black, 285.
 v. Burt, 526.
 v. Jewett, 365.
 Week v. Tibold, 40, 41.
 Weeks v. Hunt, 369.
 v. Lippencott, 291.
 v. Maillardet, 56.
 v. Martin, 74.
 Weems v. Jones, 273.
 Weiden v. Woodruff, 21, 31, 33, 34.
 Weidler v. Kauffman, 362.
 Weidner v. Phillips, 227.
 Weintz v. Hafner, 457.
 Weir v. Hudnut, 104.
 v. Marley, 305.
 Weir Plow Co. v. Walmsley, 407.
 Weis v. Devlin, 473.
 Welch v. Bunce, 164.
 v. Darling, 95.
 v. Goodwin, 521.
 v. McDonald, 412.
 v. Mandeville, 362.
 v. Marvin, 68.
 v. Miller, 492.
 v. Welch, 154.
 v. Whelpley, 93.
 Weld v. Bank, 441.
 v. Nichols, 376.
 Weller's Appeal, 199.
 Welling v. Ass'n, 345.
 Wellington v. Kelly, 298.
 Wells v. Alexandre, 120.
 v. Atkinson, 405.
 v. Calnan, 473, 476.
 v. Foster, 284, 285.
 v. Monihan, 96.
 v. People, 262, 264.
 v. Porter, 534.
 v. Seixas, 166.
 v. Smith, 409.
 v. Stout, 303.

[The figures refer to pages.]

- Wells v. Tregusan, 404.
 v. Wells, 150.
- Wellston Coal Co. v. Paper Co., 468.
- Welsh v. Gossler, 462.
 v. Huckestein, 397.
- Welty v. Jacobs, 490.
- Wendover v. Baker, 126.
- Wentworth v. Day, 38.
 v. Dows, 469.
 v. Woodside, 266.
- Werner v. Humphreys, 37.
- Werner's Appeal, 155.
- Wertz v. Telegraph Co., 320.
- Wessell v. Glenn, 480.
- Wesson v. Com., 145.
- West v. Anderson, 221, 224.
 v. Bechtel, 410, 455, 456, 466.
 v. Blakeway, 424.
 v. Camden, 301.
 v. Gregg, 158.
 v. Holmes, 276.
 v. Moore, 176.
 v. Russell, 180.
 v. Van Pelt, 462.
- Westcott v. Mitchell, 126, 128.
- Western Assur. Co. v. Towle, 538, 539.
- Western Union Tel. Co. v. Blanchard, 320.
 v. Carew, 320.
 v. Chamblee, 320.
 v. Cook, 320.
 v. Griffin, 268.
 v. Linn, 320.
 v. Railroad Co., 289.
 v. Semmes, 449.
 v. Shotter, 204.
 v. Telegraph Co., 289.
 v. Tyler, 320.
 v. Wilson, 268.
 v. Yopst, 268.
- Western Wooden-Ware Ass'n v. Starkey, 307.
- Western & A. R. Co. v. Bishop, 319.
 v. Cotton Mills, 343.
- Westfall v. Parsons, 96.
- Westlake v. Adams, 546.
- Westlake & Button v. St. Louis, 540.
- Westman v. Krumweide, 392.
- Westmeath v. Westmeath, 303.
- Weston v. Myers, 89.
- Weston Paper Co. v. Comstock, 293.
- Westropp v. Solomon, 545.
- West Virginia Transp. Co. v. Pipe Line Co., 281, 376.
- Wetherell v. Jay, 437.
 v. Langston, 382.
- Wetmore v. Mell, 15.
- Weyerhauser v. Dun, 481.
- Whaley v. Hinchman, 83.
- Wharton v. McKenzie, 155, 159.
- Wheadon v. Olds, 208, 543.
- Wheat v. Cross, 26, 31, 34, 469.
 v. Rice, 356.
- Wheaton v. East, 168, 169.
 v. Wheaton, 207, 226.
- Wheelden v. Lyford, 266.
- Wheeler v. Baars, 228.
 v. Dunn, 237.
 v. Frankenthal, 81, 92.
 v. Glasgow, 7.
 v. Knaggs, 527.
 v. McGuire, 513, 514.
 v. Marchbanks, 272.
 v. Nevins, 500.
 v. Pounds, 297.
 v. Railroad Co., 22, 418.
 v. Reed, 520.
 v. Reynolds, 94.
 v. Russell, 265.
 v. Sleigh Co., 505.
 v. Spencer, 276, 339.
 v. Stewart, 353.
- Wheeler & Wilson Mfg. Co. v. Aughey, 507.
- Wheelock v. Freeman, 16, 480.
- Wheelwright v. Wheelwright, 55.
- Whelan v. Clock Co., 473.
 v. Cook, 148.
 v. Sullivan, 86.
- Whelen v. Boyd, 460.
- Whelpdale's Case, 381.
- Whipple v. Foot, 76.
 v. Parker, 80, 95.
- Whitaker v. Burrows, 95.
 v. Groover, 437.
 v. Whitaker, 108.
- Whitbeck v. Van Ness, 436.
- Whitcomb v. Gilman, 267.
 v. Hardy, 185.
 v. Joslyn, 177.
- White v. Bank, 340, 341.
 v. Barber, 278.
 v. Baxter, 22.
 v. Bigelow, 73.
 v. Bluett, 135.
 v. Buss, 261, 330.
 v. Corlies, 3, 22, 25.
 v. Cotton Waste Corp., 174.

[The figures refer to pages.]

- White v. Drew, 104.
 v. Dwyer, 273.
 v. Farley, 179.
 v. Foster, 76.
 v. Fox, 480.
 v. Hass, 480.
 v. Heylman, 243.
 v. Holland, 81.
 v. Kunts, 133.
 v. Kuntz, 258.
 v. Levy, 81.
 v. Madison, 517.
 v. Miller, 58.
 v. Pollock, 54.
 v. Railroad Co., 295.
 v. Rintoul, 69.
 v. Ross, 250.
 v. Skinner, 517.
 v. Smith, 405.
 v. Trumbull, 439.
 v. Walker, 425.
 v. Wilson's Adm'rs, 331.
 White's Heirs v. Prentiss' Heirs, 370.
 Whitefield v. Longfellow, 241, 242.
 Whiteford v. Hitchcock, 42.
 Whitehead v. Burgess, 356.
 v. Greetham, 111.
 v. Potter, 517.
 v. Tuckett, 514.
 Whitehill v. Wilson, 49.
 White Sewing Mach. Co. v. Dakin, 482.
 Whiteside v. Brawley, 229.
 v. U. S., 145.
 Whitesides v. Bank, 480.
 v. Hunt, 278, 279, 332, 342.
 White Star Line Steamboat Co. v. Moragne, 56.
 Whiting v. Ohlert, 81.
 v. Price, 229.
 Whitman v. Arms Co., 368.
 Whitmarsh v. Hall, 164, 170, 176.
 v. Walker, 76.
 Whitney v. Bank, 469.
 v. Boardman, 224.
 v. Clary, 122.
 v. Cook, 492.
 v. Dutch, 154, 162, 167.
 v. Esson, 400.
 v. Express Co., 509.
 v. Gammon, 327.
 v. Hale, 54, 55.
 v. Kirtland, 300.
 v. Snyder, 198.
 v. Wyman, 504.
 Whitney Arms Co. v. Barlow, 193.
 Whittaker, Ex parte, 222.
 v. Improvement Co., 236, 244.
 Whittemore v. Gibbs, 100.
 v. Oil Co., 381.
 Whittier v. Collins, 252.
 v. Dana, 65.
 Whittin v. Fitzwater, 222.
 Whittingham's Case, 154.
 Whitty v. McCarthy, 296.
 Whulton v. Hardesty, 215.
 Wibaux v. Live Stock Co., 380, 383.
 Wicker v. Hoppock, 259.
 Wickes Bros. v. Electric Light Co., 395.
 Wickes' Lessee v. Caulk, 482.
 Wickiser v. Cook, 249.
 Wicks v. Smith, 236, 238.
 Widman v. Gay, 453.
 Widoe v. Webb, 323.
 Wieland v. Kobick, 177.
 Wier v. Batdorf, 91.
 Wiggin v. Cummings, 382.
 v. Goodwin, 426.
 Wiggins Ferry Co. v. Railroad Co., 289, 373.
 Wigglesworth v. Dollison, 396.
 v. Steers, 187.
 Wight v. Rindskopf, 286.
 Wilbur v. Flood, 236.
 v. Stoepel, 302.
 v. Warren, 108.
 v. Wilbur, 354, 355.
 Wilcox v. Arnold, 141.
 v. Cline, 22, 30.
 v. Daniels, 323.
 v. Draper, 24.
 v. Howland, 244, 273.
 v. University, 218, 230.
 v. Wood, 396.
 Wilcox Silver Plate Co. v. Green, 103.
 Wilde v. Wilde, 304.
 Wildey v. Collier, 286.
 v. Crane, 71, 297.
 Wiley v. Baumgardner, 59, 312.
 v. Inhabitants, 466, 468.
 v. Logan, 508.
 Wilhelm v. Eaves, 83, 414.
 v. Fagan, 83.
 v. Hardman, 156, 172, 174.
 v. Voss, 72.
 Wilkie v. Roosevelt, 272.
 Wilkin Mfg. Co. v. Lumber Co., 28.
 Wilkinson v. Byers, 132.

[The figures refer to pages.]

- Wilkinson v. Coverdale, 111, 498.
 v. Heavenrich, 89.
 v. Johnson, 482.
 v. Lindo, 382.
 v. Scott, 58.
 v. Sherman, 236.
 v. Stitt, 277.
 v. Towsley, 276.
 v. Williamson, 397.
 Willard v. Eastham, 190, 191.
 v. Tayloe, 33, 491.
 v. Wood, 354.
 Willcox v. Jackson, 187.
 William Butcher Steel Works v. At-
 kinson, 79.
 Wm. Rogers Mfg. Co. v. Rogers, 490.
 Williams v. Bank, 520.
 v. Barfield, 264.
 v. Bayley, 293.
 v. Bemis, 79, 553.
 v. Bradley, 381.
 v. Bryan, 274.
 v. Carpenter, 435.
 v. Carrington, 133.
 v. Carwardine, 40.
 v. Collins, 250.
 v. Flowers, 273.
 v. Forbes, 108.
 v. Fowle, 297.
 v. Getty, 514.
 v. Griffith, 438.
 v. Harrison, 153.
 v. Hathaway, 137.
 v. Healey, 452.
 v. Higgins, 56, 111.
 v. Inabet, 187.
 v. Kent, 392.
 v. Kerr, 225, 236.
 v. Lake, 84.
 v. Latham, 54.
 v. Mitchell, 495, 514.
 v. Moor, 141.
 v. Paine, 147.
 v. Pasquali, 174.
 v. Paul, 269, 270.
 v. Railway Co., 40.
 v. Robbins, 520.
 v. Robinson, 89, 105.
 v. Schatz, 54.
 v. Shackelford, 148.
 v. Sovieha, 181.
 v. Sorrell, 368.
 v. Spurr, 215, 221.
 v. Tiedemann, 331.
 Williams v. Wentworth, 181.
 v. Woods, 90, 512.
 Williams Mfg. Co. v. Brass Co., 433.
 Williamson v. Bale, 331.
 v. Brandenburg, 269.
 v. Cline, 478.
 v. McClure, 404.
 v. Railroad Co., 288.
 William Wilcox Mfg. Co. v. Brazos,
 261.
 Willing v. Peters, 130, 138.
 Willingham v. King, 148.
 Willis v. Gammill, 130.
 v. Terry, 58.
 v. Twambly, 153, 164, 165, 369.
 Willmering v. McGaughey, 402.
 Willoughby v. Willoughby, 415.
 Wills v. Brown, 71.
 v. Carpenter, 29.
 Willson v. Baltimore, 412.
 v. Foree, 549.
 Willwerth v. Leonard, 182.
 Willy v. Robert, 85.
 Wilmot v. Lyon, 222.
 Wilson v. Barker, 543.
 v. Bauman, 397.
 v. Bevans, 70.
 v. Carpenter's Adm'r, 228.
 v. Carson, 367.
 v. Cooper, 406.
 v. Darragh, 168.
 v. Doran, 441.
 v. Edmonds, 137, 138.
 v. Gerhardt, 374.
 v. Guyton, 38.
 v. Hundley, 235.
 v. Insurance Co., 206.
 v. Kilburn, 272.
 v. McCormick, 380.
 v. Marlow, 405.
 v. Martin, 81.
 v. Milligan, 269.
 v. Morton, 74.
 v. Oldham, 179.
 v. Powers, 126, 392.
 v. Railway Co., 490.
 v. Roots, 404, 462.
 v. Strugnell, 339.
 v. Tummam, 503, 504.
 v. Wallace, 382.
 v. White, 222.
 v. Wilson, 404.
 v. Winter, 269.
 Wilson's Assignee v. Beam, 426.

[The figures refer to pages.]

- Wilson S. M. Co. v. Curry, 244.
 Wilstach v. Heyd, 88.
 Wilton v. Tazwell, 534.
 Wimer v. Smith, 233.
 Winans v. Mfg. Co., 110.
 Winberry v. Koonce, 367.
 Winch v. Ice Co., 412.
 Winchell v. Cary, 270.
 v. Express Co., 514.
 v. Noyes, 549.
 Winchester v. Howard, 199, 200, 522.
 v. Nutter, 276.
 Winchester Electric Light Co. v. Veal, 337.
 Wind v. Iler, 344.
 Windbiel v. Carroll, 543.
 Windell v. Hudson, 69.
 Windham v. Doles, 419, 420.
 Windhill Local Board v. Vint, 294.
 Windmuller v. Pope, 444.
 Wineland v. Insurance Co., 214.
 Winfield v. Dodge, 269, 270.
 Winfield Nat. Bank v. Croco, 241.
 Wing v. Chase, 53.
 v. Mill, 140.
 v. Peck, 59.
 Wingate v. Neidlinger, 435.
 Winn v. Bull, 29, 43.
 Winne v. Hammond, 516.
 Winnebago Mills v. Travis, 439.
 Winpenny v. French, 287.
 Winslow v. Railway Co., 296.
 v. Stokes, 493.
 Winston v. Young, 226.
 Winter v. Coit, 516.
 Winters v. Cherry, 80.
 Winward v. Lincoln, 345.
 Wirebach's Ex'r v. Bank, 186.
 Wisconsin, I. & N. R. Co. v. Braham, 120.
 Wise v. Foote, 247.
 v. Miller, 24.
 Wislizenus v. O'Fallon, 141, 142.
 Wisner v. Bardwell, 323.
 Witbeck v. Waive, 58, 478.
 Witherby v. Mann, 492.
 Witherow v. Witherow, 453.
 Withers v. Greene, 469.
 v. Reynolds, 456.
 v. Richardson, 72.
 Witte v. Fishing Co., 193.
 v. Williams, 483.
 Wittenberg v. Mollyneaux, 307.
 Wolcott v. Mount, 463, 467.
 Wolf v. Fink, 435.
 v. Marsh, 448.
 v. Wolf, 75.
 Wolfe v. Horne, 515.
 v. Howes, 477, 550.
 v. Pugh, 524.
 Wolff v. Campbell, 400.
 v. Koppel, 71.
 Wolffe v. Eberlein, 141.
 Wolford v. Powers, 107.
 Wollcott v. Heath, 280.
 Wolters v. Thomas, 423.
 Wolverton v. Davis, 71.
 Womack v. Womack, 174.
 Wonsettler v. Lee, 96.
 Wood v. Allen, 397, 406.
 v. Bank, 522.
 v. Boynton, 203.
 v. Chetwood, 27, 55.
 v. College, 403.
 v. Faut, 494.
 v. Gamble, 493.
 v. Goodridge, 513.
 v. Hitchcock, 442.
 v. Lock Co., 198.
 v. Losey, 158.
 v. McCain, 503, 513.
 v. McCann, 285.
 v. Moriarty, 70, 355, 356, 418, 422.
 v. New York, 369.
 v. Paper Co., 413.
 v. Partridge, 367.
 v. Roeder, 207.
 v. Sheldon, 469, 545.
 v. Steele, 479, 480, 483.
 v. Whelen, 504.
 v. Whitehead Bros. Co., 308.
 Woodbridge v. De Witt, 229.
 Woodbridge Tp. v. Hall, 512, 519.
 Woodburn v. Woodburn, 121.
 Woodbury v. Woodbury, 247, 249.
 Woody v. Insurance Co., 63.
 Wooden v. Shotwell, 333.
 Woodham v. Allen, 293, 340.
 Woodland v. Newhall's Adm'r, 354.
 Woodle v. Whitney, 463.
 Woodman v. Davis, 510.
 v. Segar, 389.
 Wood Reaping & Mowing Mach. Co. v. Smith, 433.
 Woodruff v. Dobbins, 424.
 v. Hinman, 323.
 v. Railroad Co., 505.
 v. Scalfe, 69.

[The figures refer to pages.]

Woods v. Roberts, 249.
 Woodson v. Barrett, 369.
 Woodstock Iron Co. v. Extension Co.,
 257, 288.
 Woodward v. Washburn, 350.
 Woodworth v. Anderson, 481.
 v. Bank, 480.
 Wooldridge v. Hancock, 94.
 v. Stern, 79.
 Wooley v. Drew, 251.
 Woolner v. Hill, 449.
 Wootan v. Hasket, 276.
 Wooten v. Hinkle, 258.
 v. Walters, 454.
 v. Wilcox, 71.
 Worden v. Sharp, 81.
 Work v. Cowhick, 88.
 Workman v. Campbell, 285.
 v. Wright, 503.
 Work's Appeal, 242.
 Worley v. Sipe, 77, 121.
 Wornock v. Loar, 158.
 Worrall v. Munn, 500, 501.
 Worrell v. Forsyth, 393.
 Worth v. Case, 112.
 v. Patton, 95.
 Worthington, In re, 284.
 v. Beeman, 45.
 v. Worthington, 180.
 Worthy v. Jones, 79.
 Wright v. Bank, 180.
 v. Brown, 222.
 v. Crabbs, 315, 331.
 v. Davenport, 464, 469.
 v. Dickinson, 545.
 v. Graham, 147.
 v. Herrick, 526.
 v. Hughes, 194.
 v. Leonard, 189.
 v. McCampbell, 476.
 v. Remington, 245.
 v. Rindskopf, 294.
 v. Ryder, 308.
 v. Terry, 356.
 v. Waller, 187.
 v. Wright, 114, 180.
 Wristen v. Bowles, 28.
 Wroth v. Johnson, 276, 291.
 Wulschner v. Ward, 426.
 Wunderle v. Wunderle, 147.
 Wyant v. Leshar, 301.
 Wyckoff v. Mickle, 90.
 Wyeth v. Walzl, 236.

Wyley v. Bull, 17.
 Wyman v. Winslow, 442.
 Wynkoop v. Cowing, 462.
 W. & H. M. Goulding v. Hammond, 36,
 37.

X

Xenos v. Wickham, 32, 54.

Y

Yale v. Dederer, 191.
 v. Flanders, 53.
 Yates v. Boen, 179.
 v. Donaldson, 381, 534.
 v. Foot, 383.
 v. Robertson, 264.
 v. Valentine, 492.
 v. Yates, 514.
 Yates' Adm'rs v. Hollingsworth, 141.
 Yazoo & M. V. R. Co. v. Fulton, 492.
 Yeager v. Musgrave, 482.
 v. Yeager, 393.
 Yeager Milling Co. v. Lawler, 222,
 225.
 Yellow Poplar Lumber Co. v. Rule, 79.
 Yellowstone Kit v. State, 281.
 Yerrington v. Green, 551.
 v. Greene, 378, 476.
 Yonoski v. State, 267.
 York v. Hinkle, 244.
 v. Orton, 423.
 York & M. Line R. Co. v. Winans, 288.
 Youn v. Lamont, 187.
 Young v. Adams, 435.
 v. Arntze, 236, 237.
 v. Cole, 545.
 v. Dake, 81.
 v. Daniels, 409, 410.
 v. Herman, 17.
 v. Hill, 273.
 v. McKee, 171.
 v. Paul, 188.
 v. Stevens, 180, 183.
 v. Thomson, 293.
 v. Wheeler, 75.
 v. Young, 226.
 Young Bros. Mach. Co. v. Young, 466.
 Younge v. Guilbeau, 53.
 Young Men's Christian Ass'n v. Croft,
 357.
 Youngs v. Public Schools, 358.
 Young's Estate, In re, 17.

[The figures refer to pages.]

Z

Zabriskie v. Railroad Co., 369, 467.
 v. Smith, 365.
 v. Woodruff, 149.
Zacharie v. Franklin, 89.
Zaleski v. Clark, 432.
Zeigler v. Hughes, 217, 248, 249.
Zell v. Insurance Co., 63.
Zell Guano Co. v. Emry, 257.
Zeltner v. Irwin, 42.

Zetterlund v. Coal Co., 364.
Ziegler v. McFarland, 393.
Zimmerman v. Brown, 33.
 v. Zimmerman, 18.
Zimmer v. Water Co., 58.
Zoebisich v. Von Minden, 125.
Zouch v. Parsons, 152-154, 164.
Zuck v. McClure, 444.
Zucker v. Karpeles, 221.
Zundel v. Gess, 147.

INDEX.

[THE FIGURES REFER TO PAGES.]

A

ABANDONMENT OF CONTRACT,

- by mutual consent, 418.
- by one party, breach, 444.
- contract created by law after, 549, 552.
- of wife by husband, authority of wife to bind husband, 499, 548.

ABSOLUTE PROMISES,

- what are, 450.

ABUSE OF PROCESS,

- see "Duress."

ACCEPTANCE,

- see "Frauds, Statute of"; "Offer."
- forms of, 14.
- communication by conduct, 15.
- necessity for, 21.
- contracts by correspondence, 25.
- necessity for communication of, 22-27.
- must be absolute, 27.
 - and identical with terms of offer, 27.
- manner of, 30.
- place of, 30.
- time of, 30.
 - after lapse of offer, 36.
- when complete, 22.
- loss or delay of letter or telegram, 25.
- effect of, 21.
- by one of several parties, revocation of offer, 31.
- of offer to the public generally, 39.
- of deed, 53.
- of goods sold, 101.

ACCIDENT,

- see "Mistake."
- act of God, 428.
- alteration of instrument by, 482.
- inherent defects in property carried by carrier, 428.

ACCORD AND SATISFACTION,

- discharge by, 491.
- consideration, 122, 124, 132, 491.

[The figures refer to pages.]

ACQUIESCENCE,

see "Ratification."

acceptance by, 16.

ratification of infant's contract by, 169.

in breach of condition, 466.

ACTION,

who may sue and be sued, see "Operation of Contract"; "Quasi Contract."

remedies on breach of contract, 484.

damages, 485.

specific performance, 489.

injunction, 490.

discharge of right of action, 491.

by consent of parties, 491.

release, 491.

accord and satisfaction, 491.

by judgment, 493.

lapse of time, statute of limitations, 495.

champerty and maintenance, 296.

by or against United States, 145.

foreign states or sovereigns, 146.

aliens, 147.

convicts, 148.

married women, 191.

by attorney for services, 149.

against agent on contract of named principal, 517.

ACT OF GOD,

effect, 428.

ADMINISTRATOR,

see "Executors and Administrators."

ADVERTISEMENT,

offers by, 38, 41.

acceptance and revocation of offer, 39.

AFFECTION,

as a consideration, 108.

AFFIRMANCE,

see "Ratification."

AGENCY,

in general, 497.

distinguished from sale, 98.

creation of the relation, 497.

capacity of the parties, 154, 497.

how the relation may arise, 498.

gratuitous agency, 498.

agency of necessity, 499.

agency quasi ex contractu, 499.

partnership, 499.

ratification of unauthorized acts, 502.

ratification of contract made by corporate agent, 192.

form of authority, 500.

necessity for seal, 500.

necessity for writing, 84, 90, 500.

implied authority, estoppel by conduct, 501, 514, 526.

[The figures refer to pages.]

AGENCY—Continued.

effect of the relation, 507.

rights and liabilities of principal and agent *inter se*, 507.

duties of principal, 508.

duties of agent, 508.

fraud and breach of trust, 508.

delegation of authority by agent, 510.

rights and liabilities as to third persons, 512.

where principal is named, 512.

general and special agents, 513.

extent of agent's authority, 512.

auctioneers, 515.

factors, 515.

brokers, 516.

del credere agent, 516.

rights and liabilities of agent, 516.

contracts under seal, 517.

foreign principal, 517.

contracts in excess of authority or without authority, 517.

warranty of authority, 518.

name of principal undisclosed, 519.

existence of principal undisclosed, 521.

fraud of agent, 523.

husband as wife's agent, 501.

wife as husband's agent, 501.

to purchase necessities, 499, 547.

child as parent's agent, 501.

servant as master's agent, 501.

determination of the relation, 524.

by agreement, 525.

by act of parties, 525.

by operation of law, 527.

unlawful agreements by agent, 301.

rights of factors, brokers, and other agents, 341.

authority to bind government, 145.

creation of contractual relations through agents, 348.

AGREEMENT.

see "Acceptance"; "Mistake"; "Offer"; "Reality of Consent"; "Parties to Contracts."

defined, 2.

essentials, 2-4.

concurrence of agreement and obligation, 5-9.

revocation of agency by, 525.

ALIENS,

who are, 146.

power to contract, 146.

alien enemies, 147, 290.

actions by or against, 147.

ALTERATION,

of contract by substituted agreement, 420.

consideration, 12, 419.

statute of frauds, 65, 426.

[The figures refer to pages.]

ALTERATION—Continued.

- of instrument as a discharge, 479.
 - by whom, 482.
 - intent, 482.
 - consent, 483.
- of law, as a discharge, 474.
 - as bearing on legality of agreement, 346.
- filling blanks in deed, 56.

APPLICATION,

- of payments, 437.

APPRENTICES,

- death of master, 378.

ARBITRATION,

- provisions for, legality, 294.

ARMY,

- enlistment by infant, 151.

ASSAULT AND BATTERY,

- agreement to commit, 256.

ASSIGNMENT OF CONTRACT,

- in general, 348, 359.
- of liabilities by act of party, 360.
- of rights by act of party, at law, 361.
 - novation, 361.
 - recognition of equitable assignment at law, 363.
 - equitable assignment, 363.
 - what is assignable, 364.
 - partial assignment, 366.
 - form of assignment, 366.
 - notice of assignment, 367.
 - title of assignee, equities and defenses, 368.
 - priority between assignees, 370.
 - under statutes, 370.
 - customs of the law merchant, 371.
 - bills of exchange and promissory notes, 371.
- by operation of law, 372.
 - of obligations on transfer of interests in land, 372.
 - by marriage, 377.
 - by death, 377.
 - by bankruptcy, 372.
- of patent or copyright, 64.
- of salary or pension by officer, 284.

ASSIGNMENTS,

- voluntary assignments by infant, 151.

ATTORNEYS,

- power to contract, 149, 264.
- champerty and maintenance, 296.
- undue influence over client, 249.

AUCTION SALES,

- advertisement, 41.
- auctioneer as agent of the parties, 515.
 - for making memorandum to satisfy statute of frauds, 90

[The figures refer to pages.]

AUCTION SALES—Continued

as contracts within statute of frauds, 98.
effect of fraud, 258.

AUTHORITY,

see "Agency."

AVOIDANCE,

see "Discharge of Contract"; "Drunken Person"; "Duress"; "Fraud";
"Infants"; "Insane Persons"; "Misrepresentation"; "Mistake"; "Re-
scission"; "Undue Influence."

B**BAILMENT,**

see "Carriers."
gratuitous, 111.

BANKRUPTCY,

frauds on creditors, 257.
assignment by, 372.
as a discharge of contract, 484.
as revocation of agency, 527.
promise to pay debt after discharge in bankruptcy, 140.

BASTARDS,

bond for support by infant, 151.

BENEFITS,

see "Quasi Contract."
acceptance of, as affecting right to rescind for fraud, 236.

BETS,

see "Unlawful Agreements."

BIDDING,

see "Auction Sales."

BILLS AND NOTES,

necessity for written form, 63.
for acceptance of bill, 63.
consideration, 111.
execution on Sunday, 268.
transfer, 371.
bona fide purchasers, 335.
of notes of drunken persons, 187.
discharge by agreement, 419.
waiver of discharge, 140.
rescission for fraud, 239.
alteration, 479.
usury, 270.
effect of illegality, 334.
payment of check by mistake, 544.
payment by, 435.

BILLS OF LADING,

implied conditions, 428.

[The figures refer to pages.]

BLANKS,

see "Alteration."
execution of deed in blank, 56.

BOND,

see "Contracts under Seal."
defined, 51.
delivery in escrow, 53.
assignment, 371.
alteration, 481.

BOOKS,

entries in, as memoranda required by statute of frauds, 83.

BOYCOTTS,

see "Unlawful Agreements."

BREACH OF CONTRACT,

see "Impossibility."
as a discharge, 443.
forms of breach, 443.
renunciation of contract, 444.
impossibility of performance created by act of party, 448.
failure of performance, 449.
 whether promise is dependent or independent, 450
 absolute promises, 450.
 divisible promises, 453.
 subsidiary promises, 457.
 condition and warranty distinguished, 209, 465.
conditional promises, in general, 458.
 breach of concurrent condition, 459.
 breach of condition precedent, 459.
 caused by other party, 468.
 suspensory conditions, 459.
 failure of consideration, 468.
 executed consideration, 471.
 executory contracts of sale, 462.
 executed contracts of sale, 464.
 condition precedent in narrower sense, 464.
 waiver or acquiescence in breach of condition, 466.
remedies on breach, 484.
 recovery of money paid, 471.
 damages, 485.
 specific performance, 489.
 injunction, 490.
 discharge of right of action, 491.
 by consent of parties, 491.
 release, 491.
 accord and satisfaction, 491.
 by judgment, 493.
 by lapse of time, statute of limitations, 495.
liability of third person for inducing breach, 349.

BREACH OF MARRIAGE PROMISE,
death after breach, action by executor, 378.
damages, 487.

[The figures refer to pages.]

BRIBERY,
see "Unlawful Agreements."

BROKER,
see "Agency."
defined, 516.

C

CANCELLATION,
see "Discharge of Contract."

CAPACITY OF PARTIES,
see "Parties to Contracts."

CARRIERS,
unlawful agreements by, in general, 288.
limiting liability, 319.
conditions implied in contract, 428.

CAVEAT EMPTOR,
see "Fraud."

CERTAINTY,
as to parties, 4.
as to rights and liabilities, 5.
discussed, 43.
id certum est quod certum reddi potest, 44.
sufficiency of memorandum, statute of frauds, 82, 104.
vague promise, no consideration, 135.

CHAMPERTY AND MAINTENANCE,
validity of agreements, 296.

CHANGE,
see "Alteration."

CHARITIES,
legality of Sunday contract as work of charity, 267.

CHOSSES IN ACTION,
see "Assignment of Contract."

CLASSIFICATION,
of contracts, 47-61.

COMBINATIONS,
see "Unlawful Agreements."

COMMUNICATION,
of intention, 3.
of offer, necessity, 18.
by conduct, 15.
terms of offer partly uncommunicated, 19.
of acceptance, 22-27.
of revocation of offer, 33.

COMPOSITION WITH CREDITORS,
consideration, 133.
effect of fraud, 257.

COMPOUNDING CRIME,
validity of agreements, 293.

[The figures refer to pages.]

COMPOUND INTEREST,

usury, 272.

COMPROMISES,see "Composition with Creditors."
consideration, 122, 124, 132, 133.**COMPULSION,**

see "Duress."

CONCEALMENT,

see "Fraud."

CONCURRENT CONDITIONS,

see "Conditions."

CONDITIONS,

see "Breach of Contract"; "Impossibility."
as effecting mutuality, 117, 119.
distinguished from warranties, 209, 465.
from misrepresentation, 209.
whether promises are dependent or independent, 450.
conditional promises, in general, 458.
conditions subsequent, 427.
concurrent conditions, 459.
conditions precedent, 459.
suspensory conditions, 459.
vital conditions, 461.
executory contracts of sale, 462.
executed contracts of sale, 464.
narrower sense of condition precedent, 464.
waiver or acquiescence in breach of condition, 466.
conditional acceptance, lapse of offer, 36.
delivery of deed in escrow, 55.
precedent to rescission of contract for fraud, 237.
agreements for arbitration before action on contract, 295.
conditional payment by negotiable or nonnegotiable instrument, 435.

CONDUCT,

see "Agency"; "Estoppel"; "Fraud."
communication by, 15-18.
acceptance by, 22-27.

CONFIDENTIAL RELATIONS,

see "Agency"; "Fraud"; "Misrepresentation"; "Undue Influence."

CONFLICT OF LAWS,statute of frauds, 97.
legality of contract, 342.**CONSENT,**

see "Agreement."
reality of, 195.
to alteration of instrument, 483.
discharge of right of action by, 491.

CONSIDERATION,

see "Unlawful Agreements"; "Discharge of Contract."
defined and explained, 47, 106.
"valuable," distinguished from "good," 108.

[The figures refer to pages.]

CONSIDERATION—Continued.

- distinguished from motive, 107, 108.
- necessity for, in general, 110.
 - negotiable instruments, 111.
 - contracts under seal, 59.
- presumption of, 111, 112.
- adequacy, 112.
 - in equity, 115.
- sufficiency or reality, 116.
- mutual promises, 117.
- voluntary subscriptions, 118.
- contingent and conditional promises, 119.
- forbearance to exercise a right, 121.
 - compromises, 124.
 - time of forbearance, 123.
 - to do what one cannot legally do, 123.
- gratuitous bailment, 111.
- gratuitous employment, 111.
- gratuitous agency, 498.
- natural affection, 108.
- moral obligation, 108, 138.
- impossible promises, 134.
- vague promises, 135.
- doing or promising what one is bound to do, 126.
 - mutual discharge and substituted agreement, 2.
 - promise to third person to perform existing contract, 129.
- part payment in satisfaction of debt, 129–133.
 - gift of residue, 130.
 - release of residue under seal, 130.
 - consideration for release of residue, 131.
- accord and satisfaction, 132.
- compromise, 132.
- composition with creditors, 133.
- legality, 136.
- partial illegality, 321.
- in respect of time, 136.
 - executory and executed, 14, 136.
 - past consideration, 136.
- failure of, 468.
 - executed, 471.
 - recovery of money paid, 544.
- expression in memorandum, statute of frauds, 86, 104.
- not necessary for ratification of infant's contract, 167.
- return of, on avoidance of contract, by infant, 171.
 - by insane person, 185.
 - by drunken person, 187.
 - for fraud, 237.
- for discharge of unliquidated claim, 132.
- for discharge of contract, 419.

CONSPIRACY,

- unlawful agreements, 256.

CONSTRUCTION,

- see "Interpretation of Contract."

[The figures refer to pages.]

CONTINGENT FEES,

champertous agreements, 298.

CONTRACT,

see specific heads.

defined, 1.

executory and executed, 1.

as a legal conception, 2-12.

agreement, 2-4.

obligation, 5, 6.

concurrence of agreement and obligation, 5-9.

promise, 9, 10.

essentials, 12.

classification, 47-61.

void, voidable, and unenforceable, 10, 11.

reduction to writing, 43.

CONTRACTS OF RECORD,

defined, 49.

quasi contract, 8, 494, 530.

CONTRACTS UNDER SEAL,

in general, 51.

terms, "deed," "bond," "specialty," and "covenant," 51.

how made, 51.

delivery and acceptance, 53.

necessity for acceptance, 20.

revocation of offer, 32.

escrow, 51, 55.

execution in blank, 56.

deed poll and indenture, 57.

characteristics, 57.

estoppel, 57.

merger of simple contract, 58, 478.

limitation of actions, 59.

as dispensing with necessity for consideration, 59.

want of consideration, effect in equity, 60.

when necessary, 61.

use of seal by corporation, 192.

communication of offer, 20.

proof of, 387, 388.

release under seal, 130.

form of discharge by agreement, 424.

action by third person, 358.

by agent, necessity for authority under seal, 500.

ratification of contract under seal, 506.

liability of agent, 517.

CONTRIBUTION,

between joint debtors, 384, 534.

between co-sureties, 384, 534.

between tortfeasors, 535.

CONVEYANCES,

see "Contracts under Seal."

necessity of deed, 61.

[The figures refer to pages.]

CONVEYANCES—Continued.

- necessity for written form, 64.
- not a contract, 7.

CONVICTS,

- power to contract, 148.
- effect of conviction of husband on right of married woman to contract, 189.

COPYRIGHT,

- assignment, 64.

CORNERING THE MARKET,

- validity of combinations, 315.

CORPORATIONS,

- capacity to contract, 191.
- what contracts are authorized, 193.
- ultra vires contracts, 193.
- mode of contracting, seal, 61, 192.
- implied contracts, 192.
- ratification of contracts, 192, 504.
- records of, as memorandum required by statute of frauds, 83.
- misrepresentations in sale of shares, 216.
- unlawful agreements by officers of, 301.

CORRESPONDENCE,

- revocation of offer by, 33.
- acceptance of contract by, 25.
- payment by mail, 435.

COURTS,

- agreements ousting jurisdiction, 294.

COVENANT,

- see "Contracts under Seal."
- defined, 51.
- running with the land, 372.

COVERTURE,

- see "Married Women."

CRIME,

- agreements to commit, 256.
- compounding, 293.

CRIMINALS,

- see "Convicts."

CROPS,

- sale of, statute of frauds, 75, 101.

CUSTOM AND USAGE,

- evidence of, 396.
 - to add a term, 396.
 - to explain terms, 396.
- requisites of, 397.

D

DAMAGES,

- for breach of contract, 485.
- remote and proximate, 486.

[The figures refer to pages.]

DAMAGES—Continued.

- vindictive, punitive, or exemplary, 487.
- assessment by parties, 488.
- speculative profits, 488.
- penalty or liquidated damages, 411.

DEATH,

- of party before acceptance of offer, lapse, 37.
- of parties after delivery of deed in escrow, 55.
- of infant, avoidance of contract by heirs, 162.
- of joint promisor, 381.
- of joint promisee, 382.
- assignment by, 377.
- as discharge of contract, 476.
- as revocation of agency, 528.

DECEIT,

- see "Fraud."

DEED,

- see "Contracts under Seal."
- contracts under seal, 51.
- deed poll and indenture, 57.
- execution in blank, 56.
- delivery, 53.
 - escrow, 55.
 - statute of frauds, 91.
- alteration, 479.
- revocation before acceptance, 32.
- for conveyance of land, 64.
- parol evidence, 391.
- estoppel by, 57.

DEFAULT,

- see "Discharge of Contract."

DEFINITENESS,

- see "Certainty."

DELAY,

- see "Laches."

DEL CREDERE AGENT,

- defined, 516.

DELEGATION,

- of authority by agent, 510.

DELICT,

- see "Tort."

DELIVERY,

- of deed, 53.
- of written contract, 91.
- of Sunday contract, 268.
- of goods under statute of frauds, 101.
- assignment by delivery, 371.
- parol evidence, 391.

[The figures refer to pages.]

- DELUSION,**
see "Insane Persons."
- DEMENTIA,**
see "Insane Persons."
- DEPENDENT PROMISES,**
see "Conditions."
- DETERMINATION OF CONTRACT,**
see "Agency"; "Discharge of Contract."
- DISABILITIES,**
see "Limitation of Actions"; "Parties to Contracts."
- DISAFFIRMANCE,**
see "Rescission."
- DISCHARGE OF CONTRACT,**
see "Accord and Satisfaction."
in general, 417.
by agreement, 418.
 waiver, cancellation, or rescission, 418.
 substituted agreement, 127, 420.
 change of terms, 420.
 novation, 420.
 form of discharge by agreement, 424.
 provisions for discharge contained in contract, conditions subsequent,
 427.
 nonfulfillment of term, 427.
 occurrence of specified event, 428.
 act of God, 428.
 perils of the sea, 428.
 discharge optional with notice, 429.
by performance, 430.
 payment, 434.
 by negotiable or nonnegotiable paper, 435.
 application of payments, 437.
 tender, 440.
by breach, 443.
 breach caused by other party, 468.
 forms of breach, 443.
 renunciation of contract, 444.
 impossibility of performance created by act of party, 448.
 failure of performance, 449.
 dependent or independent promises, 450.
 absolute promises, 450.
 divisible promises, 453.
 subsidiary promises, 457.
 condition and warranty distinguished, 209, 465..
 conditional promises in general, 458.
 breach of concurrent condition, 459.
 breach of condition precedent, 459.
 suspensory conditions, 459.
 vital conditions, 461.
 failure of consideration, 468.

[The figures refer to pages.]

DISCHARGE OF CONTRACT—Continued.

- executory contracts of sale, 462.
- executed consideration, 471.
- executed contracts of sale, 464.
- conditions precedent in narrower sense, 464.
- waiver or acquiescence in breach of condition, 466.
- by impossibility of performance in general, 472.
- performance prevented by other party, 477.
- change in the law, 474.
- destruction of the subject-matter, 475.
- incapacity for personal services, 476.
- by operation of law, 478.
- merger, 478.
- alteration of written instrument, 479.
- by whom, 482.
- intent, 482.
- consent, 483.
- loss of instrument, 484.
- bankruptcy, 484.
- remedies on breach of contract, 484.
- recovery of money paid, 471.
- damages, 485.
- specific performance, 489.
- injunction, 490.
- discharge of right of action, 491.
- by consent of parties, release, 491.
- accord and satisfaction, 491.
- by judgment, 493.
- lapse of time, statute of limitations, 495.
- discharge of surety, 385.
- effect of war, 147.

DIVISIBLE CONTRACTS,

- see "Indivisible Contracts."
- what are, 453.
- effect of illegality, 324.
- breach, 453.

DIVORCE,

- agreements to facilitate, 304.

DRUNKEN PERSONS,

- see "Insane Persons."
- capacity to contract, 186.
- contracts created by law, 187.
- contracts for necessities, 187, 547.
- effect of being under guardianship, 186.
- ratification and avoidance of contract, 186.
- return of consideration, 187.
- avoidance as against third persons, 187.

DURESS,

- see "Undue Influence."
- in general, 240.
- effect, 240, 246.
- per minas, 241.

[The figures refer to pages.]

DURESS—Continued.

- of imprisonment, 242.
- of goods, 243.
- against whom, 244.
- by whom, 245.
- refusal to perform contract, 2.
- recovery of money paid under duress, 540.

E**EASEMENT,**

- statute of frauds, 76.

ELECTION OF REMEDIES,

- waiver of tort, 538, 549.

ELECTIONS,

- agreements tending to impair integrity of, 290.

ENEMIES,

- see "Aliens."

ENLISTMENT,

- by infant, 151.

EQUITABLE ASSIGNMENT,

- see "Assignment of Contract."

EQUITY,

- adequacy of consideration, 115.
- necessity for consideration, contract under seal, 60.
- part performance of contract, statute of frauds, 92.
- compelling execution of writing, 95.
- enjoining breach, 490.
- specific performance, 489.
- remedies for mistake, 207.
- effect of fraud of infant, 177.
- separate estate of married woman, 190.
- equitable estoppel by representation, 218.
- equitable assignments, 363-370.
- extrinsic evidence as to interpretation of contracts, 400.

ESCROW,

- defined and discussed, 55.
- parol evidence, 391.
- delivery of deed, statute of frauds, 91.

ESTOPPEL,

- see "Laches."
- by deed, 57.
- by judgment, 49, 493.
- by misrepresentations, 218.
- of infant, 177.
- of married woman, 189.
- agency by, 501, 514, 526.

EVIDENCE,

- see "Interpretation of Contract."
- parol evidence, statute of frauds, 82-90.

[The figures refer to pages.]

EVIDENCE—Continued.

- presumption of consideration, 111, 112.
- interpretation of contracts, 386-401.
- agreements for suppression of, 292.

EXECUTED CONTRACT,

- defined, 1.
- not within statute of frauds, 65.
- the term criticised, 7.
- of infant, 152.

EXECUTORS AND ADMINISTRATORS,

- acceptance of offer on behalf of estate, 37.
- promise to answer for debts of estate, 66.
- avoidance of contract of insane person by, 184.

EXECUTORY CONTRACT,

- defined, 1.

EXEMPTION,

- from liability for negligence, 318.

F**FACTOR,**

- see "Agency."
- defined, 515.

FAILURE OF CONSIDERATION,

- see "Consideration."

FALSE REPRESENTATIONS,

- see "Fraud"; "Misrepresentations."

FIDUCIARY RELATIONS,

- see "Agency"; "Undue Influence"; "Unlawful Agreements."

FOOD,

- regulations as to sales of food products, 264.

FORBEARANCE,

- see "Consideration."

FOREIGNERS,

- see "Aliens."

FOREIGN STATES AND SOVEREIGNS,

- capacity to contract, 146.
- actions by and against, 146.

FORM,

- see "Contracts of Record"; "Contracts under Seal"; "Frauds, Statute of."
- defined, 47.
- necessity, 47.
- classification of contracts, 47.
- of discharge of contract by agreement, 424.

FRAUD,

- see "Duress"; "Misrepresentation"; "Quasi Contract"; "Undue Influence"; "Unlawful Agreements."
- in general, 220.
- distinguished from misrepresentation, 209.

[The figures refer to pages.]

FRAUD—Continued.

- distinguished from illegality, 259.
- what constitutes, 220.
 - necessity for representation of fact, 220.
 - nondisclosure of facts, 220.
 - intention not to fulfill promise, 221.
 - concealment of facts, 222.
 - silence, 223.
- character of representation, 224.
 - statement of opinion or expectation, 224.
 - statement of intention or promise, 225.
 - misrepresentation of law, 226.
 - materiality, 226.
- right to rely on statements, 226.
 - caveat emptor, 223, 226.
 - credulity and negligence of party defrauded, 228.
- knowledge of falsity, recklessness, 229.
- intention, 230.
- dishonesty of motive, 232.
- representation must deceive, 232.
- injury must result, 233.
- of officer of corporation, 301.
- of agent, 301, 523.
 - in contracting without authority, 518.
 - avoidance of contract, 523.
- of infant, 177.
- of married woman, 189.
- on creditors, 257.
- effect, 234.
- remedies of party defrauded, 234.
 - on affirmance, 235.
 - on rescission, 235.
 - limitations to right to rescind, delay, 236.
 - acting on contract after knowledge of fraud, 236.
 - return of consideration, and placing in statu quo, 237.
 - as against third persons, 238.
- recovery of money obtained by fraud, 540.
- waiver of tort, and suit in assumpsit, 540, 549.
- money received without fraud, 541.

FRAUDS, STATUTE OF,

- the English statute, 64.
- quasi contracts, or contracts created by law, 64.
- instruments created under, and deriving obligation from, special statutes, 65.
- executed contracts, 65.
- promise by executor or administrator, 66.
- promise to answer for debt, default, or miscarriage of another, 66.
- agreements in consideration of marriage, 72.
- agreements relating to land, 73.
- agreements not to be performed within a year, 77.
 - part performance, 80.
- form required by section 4, memorandum, 82.
 - showing as to agreement, 84.

[The figures refer to pages.]

FRAUDS, STATUTE OF—Continued.

as to parties, 84.

as to terms, 85.

as to subject-matter, 86.

as to consideration, 86.

separate papers, 87.

signature, 88.

by agent, 90, 500.

parol ratification, 506.

delivery, 91.

effect of noncompliance with section 4, 91.

part performance as taking contract out of statute, 73, 80, 92, 101, 552.

recovery on implied contract for part performance, 95.

conflict of laws, 97.

parol contract as a defense, 96.

• who may plead the statute, 96.

waiver of statute, 96.

sales of goods, etc., seventeenth section, 97.

meaning of "goods, wares, and merchandises," 100.

value, 99.

work and labor, 99.

acceptance and receipt, 101.

earnest and part payment, 104.

form required by section 17, 104.

effect of noncompliance with section 17, 105.

FUTURES,

unlawful intent on one side, 331.

G**GAMING,**

validity of contracts, 275.

insurance, 277.

premiums or purses, 277.

futures, 278.

loan to pay gambling debt, 330.

GIFT,

not a contract, 7.

of residue on part payment of debt, 130.

GOVERNMENT,

see "States"; "United States."

validity of agreements affecting, 289.

GRATUITOUS AGENCY,

in general, 498.

GRATUITOUS PROMISES,

see "Consideration";— "Contracts under Seal."

necessity of seal, 61.

effect of seal, 59.

GUARANTY,

acceptance of offer, 24.

statute of frauds, 66.

memorandum required by statute of frauds, 84.

[The figures refer to pages.]

GUARDIAN AND WARD,

- avoidance of contract of insane person by guardian, 184.
- contracts by drunken person under guardianship, 187.
- contracts between, **undue influence**, 249.

H

HUSBAND AND WIFE,

- see "Marriage"; "Married Women."
- assignment of contract by marriage, 377.
- antenuptial debts of wife, infant husband's liability, 151.
- liability for necessities furnished to wife or child of infant, 158.
- contracts of married women, 188.
- wife as husband's agent, 501.
 - to purchase necessities, 499, 547.
 - revocation of agency, 526.
- husband as wife's agent, 501.
- agreements in derogation of marriage relation, 302-304.

I

IDIOTS,

- see "Insane Persons."

IGNORANCE,

- see "Mistake."
- of offer or acceptance, 18-27.
- of public offer, performance of services, 39.
- of terms and conditions of offer, 19.
- of insanity of party to contract, 183.

ILLEGALITY,

- see "Unlawful Agreements."

IMMORAL AGREEMENTS,

- see "Unlawful Agreements."

IMPLIED CONTRACTS,

- see "Quasi Contract."
- the term explained, 16, 530.
- formation by conduct, 15-18.
- distinguished from quasi contract, 530.
- when contract implied in fact, 15-18.
 - relationship of parties, 17.
- from part performance of contract within statute of frauds, 95, 552.
- of corporation, 192.
- discharge of contract by occurrence of implied conditions, 428.

IMPOSSIBILITY,

- meaning of term, 134.
- impossible promise, no consideration, 134.
- created by act of party, as a breach, 448.
- as a discharge of contract, 472.
 - change in the law, 474.
 - destruction of subject-matter, 475.
 - incapacity for personal services, 476.

[The figures refer to pages.]

IMPRISONMENT,
see "Duress."

IMPROVEMENTS,
effect under statute of frauds, 93.

INCOMPLETE NEGOTIATIONS,
are not contract, 42.

INDENTURE,
defined, 57.

INDEPENDENT PROMISES,
see "Conditions."
whether promises dependent or independent, 450.

INDIVISIBLE CONTRACTS,
see "Divisible Contracts."
what are, 453.
effect of illegality, 322.
breach, 453.

INFANTS,
who are, 150.
capacity to contract, 149.
appointment of agent, 154.
effect of emancipation, 150.
removal of disabilities, 150.
the old doctrine as to effect of contracts, 150.
valid contracts, 151.
liability for wife's antenuptial debts, 151.
under authority or direction of statute, 151.
doing what could have been compelled, 152.
executed contracts, 152.
contracts for necessities, rules stated, 155.
what are necessities, 155.
must concern his person, 157.
money, 158.
necessaries furnished wife and children, 158.
persons supplying infant act at their peril, 159.
question of law or fact, 159.
express contract and securities, 159.
quasi contract, 548.
void contracts, 153.
voidable contracts, 153.
ratification and avoidance of contract, 160.
ratification, 140.
cannot ratify act of agent, 505.
when disaffirmance necessary, 160.
when ratification necessary, 161.
who may avoid contract, privilege personal, 162.
time of avoidance, 164.
delay in avoiding, 164.
what amounts to ratification, 166.
implied ratification, 166.
necessity for writing, 63, 166.
what amounts to disaffirmance, 170.

[The figures refer to pages.]

INFANTS—Continued.

- implied disaffirmance, 170.
- extent of ratification or disaffirmance, 171.
- return of consideration, 171.
- effect of ratification, 175.
- effect of disaffirmance, 175.
- as against third persons, 175.

- torts in connection with contracts, 176.
- employment in violation of statute, 264.

INJUNCTION,

- against breach of contract, 490.

INSANE PERSONS,

- capacity to contract, 178.
- contracts created by law, 181.
- effect of contracts, 180.
- contracts as void or voidable, 181.
- contracts for necessities, 181, 547.
- effect of inquisition and adjudication of lunacy, 182.
- ignorance and good faith of the other party, 183.
- ratification and avoidance of contract, 184.
 - personal privilege as to avoidance, 184.
 - return of consideration, 185.
 - avoidance as against third persons, 185.
- insanity before acceptance of offer, lapse of offer, 37.
- mental weakness, undue influence, 251.
- revocation of agency by insanity, 528.

INSOLVENCY,

- promise to pay debt after discharge in insolvency, 140.
- frauds on creditors, 257.

INSURANCE,

- form, writing, 63.
- misrepresentations, 213.
- insurable interest, 277.
- wagering contracts, 275, 277.

INTENTION,

- see "Acceptance"; "Alteration"; "Fraud"; "Mistake"; "Offer"; "Unlawful Agreements."
- must be expressed, 3.
- must be distinct and common, 3.
- must be communicated, 3.
- legal relations must be contemplated, 40.
- invitations to deal, 41.
- offers in jest, 41.
- fraudulent, 230.
- usurious, 274.
- sales for future delivery, 278.
- fraudulent representations as to matters of intention, 225.
- alteration of instrument, 482.

INTEREST,

- usury, 270.
- alteration as to, 481.

[The figures refer to pages.]

INTEREST—Continued.

insurable interest, 277.

revocation of agency coupled with interest, 527, 529.

INTERPRETATION OF CONTRACTS,

in general, 386.

rules relating to evidence, in general, 386.

parol evidence, 386.

province of court and jury, 387.

difference between formal and simple contracts, 388.

proof of document, 388.

contracts under seal, 388.

simple contracts, 389.

evidence as to fact and validity of agreement, 390.

as to terms of agreement, 392.

proof of supplementary or collateral terms, 393.

explanation of terms, 394.

evidence of custom or usage, 396.

to add a term, 396.

to explain terms, 396.

requisites of custom or usage, 397.

evidence as to terms in equity, 400.

rules of construction, in general, 402.

terms implied, unexpressed intention, 407.

rules as to time, 408.

penalty or liquidated damages, 411.

joint and several contracts, 415.

liabilities, 415.

subscriptions, 415.

rights, 416.

INTOXICATING LIQUORS,

sales in violation of statute, 265.

INTOXICATION,

see "Drunken Persons."

INVITATIONS TO DEAL,

distinguished from offers, 41.

]

JEST,

offer in jest, 41.

JOINT AND SEVERAL CONTRACTS,

see "Interpretation of Contract"; "Operation of Contract."

JOKE,

offer in jest, 41.

JUDGMENTS,

as constituting contract, 8, 49, 530.

estoppel by, 49, 493.

merger of cause of action, 50, 493.

remedies on, 50.

[The figures refer to pages.]

K

KNOWLEDGE,

- of revocation of offer, 33.
- of public offer, performance of services, 40.
- of falsity of representations, 229.

L

LACHES,

- in avoiding contract of infant, 164.
 - of insane person, 184.
 - of drunken person, 186.
 - on the ground of mistake, 208.
 - on the ground of fraud, 236.
 - on the ground of duress, 246.
 - on the ground of undue influence, 252.
- acquiescence in breach of contract, 466.
- discharging right of action, 495.

LANDLORD AND TENANT,

- statute of frauds, 73, 81.
- lease in violation of statute, 265.
- covenants affecting leasehold interests, 373.

LAPSE,

- of offer, 36-38.

LEASE,

- see "Landlord and Tenant."

LEGALITY,

- see "Unlawful Agreements."

LEGAL RELATIONS,

- agreement must refer to, 4, 6, 40.
- offer must be capable of creating, 40.

LETTERS,

- acceptance by posting letter, 25.
- as memoranda required by statute of frauds, 83.

LEX LOCI AND LEX FORI,

- see "Conflict of Laws."

LIBEL AND SLANDER,

- unlawful agreements, 256, 259.

LICENSE,

- statute of frauds, 176.
- failure to procure, 264.

LIMITATION OF ACTIONS,

- in general, 495.
- disabilities and exceptions, 495.
- acknowledgment and new promise, 141, 496.
 - writing, 63.
- part payment, 496.
- on contracts, 59.

[The figures refer to pages.]

- LIMITING LIABILITY,**
for negligence, 318.
- LIQUIDATED DAMAGES,**
or penalty, 411.
- LOANS,**
usury, 270.
for illegal purposes, 330.
- LOBBYING CONTRACTS,**
validity, 285.
- LOCUS PENITENTIÆ,**
see "Unlawful Agreements."
- LOSS,**
of instrument, 484.
- LOTTERIES,**
validity, 280.
- LOVE AND AFFECTION,**
as a consideration, 108.
- LUNATICS,**
see "Insane Persons."

M

- MAIL,**
acceptance of contract by, 25.
death of proposer after acceptance, 37.
payment by mail, 435.
- MAINTENANCE,**
validity of contracts, 296, 297.
- MARRIAGE,**
see "Husband and Wife"; "Married Women."
not a contract, 7, 9.
assignment by, 377.
marriage brocage contracts, 302.
agreements in consideration of, statute of frauds, 72.
part performance, 73.
promise to marry, statute of frauds, 72, 81.
consideration, 117.
by married person, 304, note.
as a consideration, 116.
agreements in restraint of, 302.
as revocation of agency, 528.
- MARRIED WOMEN,**
see "Husband and Wife."
capacity to contract, 188.
at common law, 189.
in equity, 190.
torts in connection with contract, 189.
equitable separate estate, 190.
common law changed by statute, 191.
promises during coverture, ratification, 141.

[The figures refer to pages.]

MASTER AND SERVANT,

- see "Agency."
- contract for services, statute of frauds, 81.
- specific performance, 490.
- discharge of contract of employment, 428, 429.
 - by breach, 444.
 - by death or illness, 476.
- enticing away servant, 349.
- servant as master's agent, 501.
- employment of infants, 264.
- limiting master's liability for negligence, 318.
- combinations between employes, 316.
- combinations between employers, 318.

MAXIMS,

- id certum est quod certum reddi potest*, 44.
- ex dolo malo non oritur actio*, 336.

MEASURE OF DAMAGES,

- see "Damages."

MEMORANDUM,

- required by statute of frauds, 82, 104.

MENTAL INCAPACITY,

- see "Drunken Persons"; "Infants"; "Insane Persons."

MERGER,

- of cause of action in judgment, 50, 493.
- of simple contract in contract under seal, 58, 478.

MINORS,

- see "Infants."

MISREPRESENTATION,

- see "Fraud."
- in general, 208.
- what amounts to a representation, 219.
- distinguished from fraud, 209.
 - from conditions and warranties, 209.
- effect, 209, 213.
- confidential relations, 216.
- contracts of suretyship, 217.
- effect in equity, 217.
- estoppel by, 218.
- contracts of insurance, 213.
- contracts for the sale of land, 215.
- contracts to purchase shares in companies, 216.
- by infants, 176.
- by married women, 189.

MISTAKE,

- see "Fraud"; "Misrepresentation."
- in general, 196.
- as to nature of transaction, 196.
- as to person with whom contract is made, 199.
- as to subject-matter of contract, 200.
 - existence of subject-matter, 201.
 - identity of subject-matter, 202.

[The figures refer to pages.]

MISTAKE—Continued.

- nature and essential qualities of subject-matter, 202.
- as to quantity, 204.
- as to price, 204.
- as to nature of promise known to the other party, 204.
- of law, 206.
- effect, 207.
- remedies, 207.
- unlawful agreements, mistake of fact, 326.
 - mistake of law, 325.
- effect on ratification of agent's acts, 505.
- alteration of instrument, 482.
- payment under, 542.
- avoidance of contract as to third persons, 197.

MODIFICATION,

- see "Alteration."

MONEY PAID,

- recovery, 533.

MONEY RECEIVED,

- recovery, 536-547.

MONOPOLIES,

- validity of combinations, 312-318.

MORALITY,

- see "Unlawful Agreements."

MORAL OBLIGATION,

- as consideration, 108, 138, 301.

MOTIVE,

- distinguished from consideration, 107.
- in making fraudulent representations, 232.

MUNICIPAL CORPORATIONS,

- resolution of city council as memorandum required by statute of frauds, 83.

MUTUALITY,

- necessity, 117, 119.

MUTUAL PROMISES,

- consideration, 117.

N**NECESSARIES,**

- see "Agency"; "Drunken Persons"; "Infants"; "Insane Persons"; "Quasi Contract."

NEGLIGENCE,

- see "Laches."
- limiting liability, 318.
- of party defrauded, 197, 228.
- in receiving counterfeit notes as payment, 435, note.
- of agent, 508.

NEGOTIABLE INSTRUMENTS,

- see "Bills and Notes."

[The figures refer to pages.]

NON COMPOS MENTIS,
see "Insane Persons."

NOTICE.

- of offer, 18.
- of acceptance, 22-27.
- of revocation of offer, 33.
 - of agent's authority, 526.
- of assignment, 367.
 - priority, 370.
- of happening of condition, 460.

NOVATION,

- what constitutes, 362, 420.

NUDUM PACTUM,

- see "Consideration"; "Promise."

O

OBLIGATION,

- see "Quasi Contract."
- defined, 5.
- essentials, 5, 6.
- sources of, 8, 9.
- concurrence of agreement and obligation, 5-9.

OBSTRUCTING JUSTICE.

- validity of agreements, 292.

OFFER,

- see "Acceptance."
- forms of, 13-15.
- communication by conduct, 15-18.
- necessity for communication, 18-20.
- terms partly uncommunicated, 19.
- revocation of, 31-36.
 - communication of revocation, 33.
 - agreement to keep offer open, 33, 119.
- lapse of, 36-38.
- to the public generally, 38.
 - acceptance and revocation, 39.
- as referring to legal relations, 40.
 - must be definite and certain, 43.
 - made in jest, 41.
 - distinguished from invitations to deal, 41.
 - incomplete negotiations, 41.

OFFICE AND OFFICER,

- traffic in public offices, 282.
- agreements affecting compensation of officers, 283
- assignment of salary or pension of officer, 284.
- corruption of public officers, 286.
- lobbying contracts, 285.

OPERATION OF CONTRACT.

- see "Agency"; "Assignment of Contract."
- in general, 347.

[The figures refer to pages.]

OPERATION OF CONTRACT—Continued.

- limits of contractual relation, 347.
 - agency, 348.
 - assignment, 348.
 - imposing liability on third persons, 349.
 - imposing duty on third persons not to interfere, 349.
 - conferring rights on third persons, 351.
 - promise for benefit of third person, 352.
 - action by third party for many joint contractors, 358.
- joint and several contracts, 379.
 - joint contracts, 379.
 - release, 381, 382.
 - survivorship, 381, 382.
 - several contracts, 383.
 - survivorship, 383.
 - contracts both joint and several, 384.
 - survivorship, 384.
 - contribution between joint debtors, 384.
- assignment of rights and liabilities, 359-378.

OPINION,

- representations as to matters of opinion, 224.

OPTIONS,

- revocation, 33.
- consideration, mutuality, 119.
- to terminate contract, 429.

ORAL CONTRACTS,

- see "Acceptance"; "Frauds, Statute of"; "Interpretation of Contract"; "Offer."
- classification, 47.

P

PAR DELICTUM,

- see "Unlawful Agreements."

PARENT AND CHILD,

- undue influence, 248.
- child as parent's agent, 501.
- agreements in derogation of parental relation, 305.

PAROL CONTRACTS,

- defined, 48.
- classification, 47.

PAROL EVIDENCE,

- see "Interpretation of Contract."
- interpretation of contract, 386-401.

PARTIES TO CONTRACTS,

- see "Drunken Persons"; "Infants"; "Insane Persons"; "Operation of Contract."
- two parties necessary, 3, 5.
- signature, statute of frauds, 88, 90.
- showing as to, statute of frauds, 84.
- mistake as to identity of party, 199.
- must be definite, 4.

[The figures refer to pages.]

PARTIES TO CONTRACTS—Continued.

- joint and several liability, 379, 415.
- capacity to contract, in general, 45, 143.
 - political status, states and United States, 144.
 - foreign states and sovereigns, 146.
 - aliens, 146.
 - alien enemies, 147.
 - convicts, 148.
- professional status, 149.
- infants, 149–178.
- insane persons, 178–186.
- drunken persons, 186–188.
- married women, 188.
- corporations, 191.
- to appoint agent, 497.
- to act as agent, 497.
- limits of contractual relations, 347.
- imposing liability on third persons, 349.
- conferring rights on third persons, 351–359.
- assignment of rights and liabilities, 359–378.
- consent to alteration, 483.

PARTNERSHIP,

- see “Agency.”
- statute of frauds, 75, 98.
- avoidance of contract of, by infant, 165.
- agency of partners, 499.
- dissolution before acceptance of offer by, 37.

PART PAYMENT,

- to take contract out of statute of frauds, 92, 104.
- in satisfaction of debt, 129–133.
- after limitations, 496.

PART PERFORMANCE,

- see “Discharge of Contract”, “Quasi Contract”; “Frauds, Statute of.”

PAST CONSIDERATION,

- discussed, 136.

PATENTS FOR INVENTIONS,

- assignment, 64.
- monopolies under, 315.

PAYMENT,

- see “Assignment of Contract.”
- what constitutes, 434.
- by negotiable or nonnegotiable paper, 435.
- application of payments, 437.
- presumption of, 495.
- part payment in satisfaction of debt, 129–133.
 - after limitations, 496.
- as taking contract out of statute of frauds, 92, 104.
- tender, 440.
- recovery of money paid for use of another, 533.
 - on failure of consideration, 471.
 - voluntary payments, 541.
- recovery of money received for use of another, 536.

[The figures refer to pages.]

PENALTY,

or liquidated damages, 411.
distinguished from usury, 272.
sale without license, 265.

PENSIONS,

assignment, 284.

PERFORMANCE,

see "Discharge of Contract"; "Frauds, Statute of."
suit for specific performance, 489.
acceptance of contract by performance, 22-25, 39.
part performance, 549, 552.

PERILS OF THE SEA,

effect, 428.

PERJURY,

contract to procure false testimony, 292.

PHYSICIAN,

power to contract, 149, 264.

PLACE,

of acceptance, 30.

POLICE POWER,

prohibiting unlawful agreements, 259.

POLLICITATION,

defined, 21.

POSSESSION,

effect under statute of frauds, 92.
as evidence of delivery of deed, 55.

POWERS,

of attorney, 500.

PREMIUM,

offer of, legality, 277.

PRESUMPTION,

as to delivery of deed, 55.
of consideration, 111, 112.
of undue influence, 250.

PRIEST AND PARISHIONER,

undue influence, 249.

PRINCIPAL AND AGENT,

see "Agency."

PRINCIPAL AND SURETY,

see "Suretyship."

PRIORITIES,

between assignees, 370.

PRIVILEGE,

personal privilege to avoid contract, infants, 162.
insane persons, 184.

[The figures refer to pages.]

PROMISE,

- defined, 9.
- essentials, 9, 10.
- as consideration for promise, 117.
- fraudulent, 225.
- new promise to pay debt after discharge in bankruptcy, 140.
- after bar by limitations, 496.

PROOF,

- see "Interpretation of Contract."

PROPOSAL,

- see "Offer."

PUBLIC POLICY,

- see "Unlawful Agreements."

Q**QUANTUM MERUIT,**

- see "Quasi Contract."

QUASI CONTRACT,

- in general, 8, 530.
- judgments, 494, 530.
- obligation imposed by statute, 531.
- money paid for the use of another, 533.
- money received for the use of another, 536.
 - debts arising from tort, waiver of tort, 538.
 - money obtained by fraud or duress, 540.
- liability of third persons, 541.
- money obtained without fraud or wrong, 541.
 - voluntary payment, 541.
 - money paid under mistake, 542.
 - failure of consideration, 544.
 - money paid under illegal agreement, 546.
- recovery for benefits conferred, quantum meruit, 547.
 - liability for necessities, 547, 159.
 - forcing benefit upon another, 548.
 - benefits rendered gratuitously, 549.
 - goods wrongfully obtained, waiver of tort, 549.
 - part performance of contract, 549.
 - retaining benefits, 551.
 - part performance of illegal contract, 552.
 - part performance of unenforceable or void contract, 552.
 - on rescission of contract, 553.
- agency quasi ex contractu, 499.
- part performance of contract within the statute of frauds, 95.
- liability of corporation, receipt of benefit under ultra vires contract, 192-194.
- liability of infants, 151, 159.
- liability of insane persons, 181.
- liability of drunken person, 187.
- statute of frauds not applicable, 64.

[The figures refer to pages.]

R

RAILROAD COMPANIES,

unlawful agreements, 288.

limiting liability for negligence, 319.

RATIFICATION,

see "Drunken Persons"; "Duress"; "Fraud"; "Infants"; "Insane Persons."

consideration, 140.

agency by, 502.

after knowledge of fraud, 235.

of contract of married woman, 141.

of infant, 160.

of insane person, 184-186.

of drunken person, 186.

of Sunday contract, 269.

of alteration, 483.

REALITY OF CONSENT,

see "Duress"; "Fraud"; "Misrepresentation"; "Mistake"; "Undue Influence."

in general, 195.

RECOGNIZANCE,

defined, 50.

as a contract of record, 50.

RECORDS,

see "Contracts of Record."

REFORMATION,

of contract, 208.

REFUSALS,

agreement to keep proposal open, revocation, 33.

consideration, mutuality, 119.

RELEASE,

see "Accord and Satisfaction"; "Composition with Creditors"; "Compromise"; "Discharge of Contract"; "Payment."

on part payment, 129-133.

of joint debtor, 381.

as against joint creditor, 382.

of right of action, 491.

REMEDIES,

see "Action"; "Agency"; "Duress"; "Equity"; "Fraud"; "Mistake"; "Quasi Contract."

RENUNCIATION,

see "Breach of Contract."

REPRESENTATIONS,

see "Fraud"; "Misrepresentation."

RESCISSION,

see "Discharge of Contract"; "Drunken Persons"; "Duress"; "Fraud"; "Infants"; "Insane Persons"; "Mistake"; "Revocation"; "Undue Influence."

[The figures refer to pages.]

RESCISSION—Continued.

- on ground of fraud, 235.
- because of other's unlawful purpose, 332.
- recovery for part performance, 553.
- contract to rescind, not within statute of frauds, 98.

RES JUDICATA,

- see "Judgment."

RESTRAINT OF MARRIAGE,

- agreements unlawful, 302.

RESTRAINT OF TRADE,

- validity of agreements, 305-312.
 - consideration, 60.
 - reasonableness, 305.
 - unlimited as to space, 308.
 - unlimited as to time, 309.
 - sale of secret process, 311.
- monopolies, 312-318.

RETURN OF CONSIDERATION,

- see "Consideration."

REVIVAL,

- of debt discharged by bankruptcy, 140.
- of debt barred by limitations, 496.

REVOCATION,

- of offer, 31-36.
 - communication, 33.
 - to the public generally, 39.
 - agreement to keep offer open, 33.
- of agency, 524.

REWARD,

- offer of, 38.
 - acceptance, 23, 39.
 - revocation, 39.
 - legality, 277.
- recovery by public officer, 283.

RIGHT OF WAY,

- statute of frauds, 76.

S**SALES,**

- see "Conditions"; "Fraud"; "Frauds, Statute of"; "Misrepresentation"; "Mistake"; "Quasi Contract"; "Warranty."

SATISFACTION,

- see "Accord and Satisfaction"; "Composition with Creditors"; "Compromise"; "Discharge of Contract"; "Payment"; "Release."

SEAL,

- see "Contract under Seal."
- defined, 52.
- necessity on deeds, 52.
- adding or effacing, 480.

[The figures refer to pages.]

SEAL—Continued.

- use of by corporation, 192.
- authority of agent under seal, 500.

SEPARATE ESTATE,

- of married woman, 190.

SEPARATION AGREEMENTS,

- validity, 303.

SERVICES,

- contract for, statute of frauds, 81.
 - distinguished from sale, 99.
- gratuitous employment, 111.
- employment of infants, 264.
- specific performance of contract for, 490.
- discharge of contract for, 428, 429.
 - by breach, 444.
 - by renunciation, 444.
 - by death or illness, 476.
- promise to pay for past services, 138.
- acceptance of contract by performance of, 24.
- acceptance of services performed, 41.

SEVERABLE CONTRACTS,

- see "Divisible Contracts"; "Indivisible Contracts."

SEVERAL CONTRACTS,

- see "Operation of Contract."

SICKNESS,

- discharge of contract by, 476.

SIGNATURE,

- statute of frauds, 88, 90.

SIMPLE CONTRACTS,

- classification, 47.
- defined, 48.
- interpretation, 388, 389.
- merger in contract under seal, 58.
- limitation of actions, 59.

SPECIALTY,

- see "Contracts under Seal."
- defined, 51.

SPECIFIC PERFORMANCE.

- in general, 489.
- contract with infant, 163.
- mistake, 208.

SPENDTHRIFT,

- capacity to contract, 187.

STATES,

- power to contract, 144.
- construction of contracts with, 145
- actions by or against, 145.

STATUTE OF FRAUDS,

- see "Frauds, Statute of."

[The figures refer to pages.]

- STATUTE OF LIMITATIONS,
see "Limitation of Actions."
- STOCK SPECULATION,
see "Unlawful Agreements."
- STRIKES,
see "Unlawful Agreements."
- SUBSCRIPTIONS,
consideration, 118.
joint or several liability, 415.
- SUBSIDIARY PROMISES,
see "Conditions"; "Warranty."
what are, 209, 457.
breach, 457.
- SUBSTITUTED AGREEMENT,
consideration, 127.
as discharge of contract, 420.
- SUIT,
see "Action."
- SUNDAY LAWS,
legality of contract, 265-270.
- SURETYSHIP,
statute of frauds, 66.
misrepresentation, 217.
right of surety against principal, 384.
contribution between cosureties, 384.
- SUSPENSORY CONDITIONS,
in general, 459.

T

- TELEGRAMS,
as memoranda required by statute of frauds, 83.
acceptance of contract by telegraph, 27.
- TELEGRAPH COMPANIES,
limiting liability, 320.
- TENDER,
what constitutes, 440.
effect, 440.
- TERMINATION OF CONTRACT,
see "Agency"; "Discharge of Contract."
- THIRD PERSONS,
see "Operation of Contract."
avoidance of contract as against, by infant, 175.
by insane person, 185.
by drunken person, 187.
for want or failure of consideration, 111.
for fraud, etc., 238.
for mistake, 197.
right to avoid contract with infant, 162.
insane persons, 184.
for duress, 245.

[The figures refer to pages.]

THIRD PERSONS—Continued.

- liability for inducing breach of contract, 349.
- receipt of money or property by, implied contract, 541.

TIME,

- of acceptance, 30.
- lapse of offer, 36.
- for performance of contract, 433.
- for avoidance of contract of infant, 164.
 - of insane person, 184.
 - of drunken person, 187.
 - for mistake, 208.
- rules as to, time of essence, 408.

TORT,

- see "Unlawful Agreements."
- distinguished from contract, 18.
- of married woman in connection with contracts, 189.
- of infant in connection with contract, 176.
- waiver and suit in assumpsit, 538, 549.

TRADE SECRETS,

- sale of, 311.

TRUSTS,

- not contract, 7.
- undue influence over cestui que trust, 249.

U

UNCERTAINTY,

- see "Certainty."

UNDISCLOSED AGENCY,

- name of principal, 519.
- existence of principal, 521.

UNDUE INFLUENCE,

- see "Duress"; "Fraud."
- in general, 246.
- effect, 246, 252.
- presumption from circumstances, 247.
- relationship of parties, 248.
 - parental and quasi parental relation, 248.
 - other family relations, 248.
 - fiduciary relations, 249.
 - other confidential relations, 249.
- continuance of presumption, 250.
- mental weakness, 251.
- personal influence absent, advantage taken of another's weakness and distress, 251.

UNENFORCEABLE,

- meaning of term, 10.

UNITED STATES,

- power to contract, 144.
- actions by or against, 145.
- construction of contracts with, 145.

[The figures refer to pages.]

UNLAWFUL AGREEMENTS,

- in general, 254.
- classification, 255.
- agreements in violation of positive law, 255.
- breach of express rules of common law, 256.
 - involving commission of crime, 256.
 - to commit civil wrong, 256.
 - frauds on creditors, 257.
 - fraud in connection with auction sales, 258.
 - publication of libel, 259.
- breach of statute, powers of legislature, 259.
 - the prohibition by statute, 260.
 - mala in se and mala prohibita, 260.
 - effect of penalty, 261.
 - omission of penalty, 262.
 - doing indirectly what cannot be done directly, 262.
 - agreements prohibited but declared not void, 262.
 - agreements simply void and unenforceable, 263.
 - regulating trade, profession, or business, 263.
 - necessity of license, 264.
 - traffic in intoxicating liquors, 265.
 - Sunday laws, 265.
 - usury laws, 270.
 - wagers and gambling transactions, 275.
 - offer of premium or reward, 277.
 - contracts of insurance, 275, 277.
 - dealings in futures, 278.
 - lotteries, 280.
- agreements contrary to public policy, in general, 281.
 - tending to injure the public service, 282.
 - traffic in public offices, 282.
 - compensation of public officers, 283.
 - assignment of salary or pension by officer, 284.
 - lobbying contracts, 285.
 - corruption of public administrative officers, 286.
 - agreements by public or quasi public corporations, 288.
- agreements affecting the government, 289.
- agreements promotive of nonofficial corruption, 290.
 - breach of public duty by private citizen, 290.
 - impairing integrity of public elections, 290.
- perversion or obstruction of public justice, in general, 292.
 - compounding crime, 293.
 - reference to arbitration, 294.
- encouragement of litigation, champerty and maintenance, 296.
- agreements of immoral tendency, 300.
- agreements tending to fraud and breach of trust, in general, 301.
 - by officer of corporation, 301.
 - by agent, 301.
- in derogation of the marriage relation, 302.
 - restraint of marriage, 302.
 - marriage brocage, 302.
 - separation agreements, 303.
 - agreements to facilitate divorce, 304.
 - other agreements, 304.

[The figures refer to pages.]

UNLAWFUL AGREEMENTS—Continued.

- in derogation of parental relation, 305.
- restraint of trade, 305.
 - consideration, seal, 60.
 - reasonableness of restraint, 305.
 - unlimited as to space, 308.
 - unlimited as to time, 309.
 - sale of secret process, 311.
 - unlawful combinations, monopolies, trusts, etc., 312.
 - "corners" in the market, 315.
 - monopolies under patents, 315.
 - combinations between laborers, mechanics, etc., 316.
 - combinations between employers, 318.
- exempting from liability for negligence, 318.
- effect of illegality, 321.
 - agreements partly illegal, 321.
 - * indivisible agreements, 322.
 - divisible agreements, 324.
 - direct object unlawful, but intention innocent, 325.
 - mistake of law, 325.
 - mistake or ignorance of fact, 326.
 - direct object innocent, but intention unlawful, 327.
 - the English rule, 327.
 - the rule in America, 328.
 - distinction where illegal act is past, 331, note.
 - unlawful intention on one side only, 331.
 - promises to pay money due or to become due on illegal transactions, 332.
 - distinction between "void" and "illegal," 332.
 - negotiable instruments, 334.
 - relief of party to unlawful agreement, 336.
 - ex dolo malo non oritur actio, 336.
 - locus poenitentiae, 338.
 - par delictum, 340.
 - rights of factors, brokers, and other agents, 341.
 - recovery of money paid, 346.
- illegality distinguished from fraud, 259.
- * conflict of laws, 342.
 - as to space, 342.
 - as to time, change of law, 342.
- part performance, 552.

UNLIQUIDATED CLAIM,

- consideration of discharge, 132.

USAGE,

- see "Custom and Usage."

USURY,

- in general, 270.

V**VAGUENESS,**

- see "Certainty."

VARIANCE,

- between offer and acceptance, 27-29.
- lapse of offer, 36.

[The figures refer to pages.]

VENDOR AND PURCHASER,

see "Conditions"; "Fraud"; "Frauds, Statute of"; "Misrepresentation";
"Mistake"; "Warranty."

VOID,

see specific heads such as "Drunken Persons," "Infants," etc.
meaning of term, 10.

distinction between "void" and "illegal," 332.

VOIDABLE,

see specific heads such as "Drunken Persons," "Infants," etc.
meaning of term, 10.

W

WAGERS,

validity, 275-279.

WAIVER,

see "Discharge of Contract."
of written contract, statute of frauds, 65.
of statute of frauds, 96.
of discharge from liability, 140.
of breach, 466.
of tort, 538, 549.

WAR,

effect on contracts with aliens, 147.

WARRANTY,

distinguished from representation, 209
distinguished from condition, 209, 465.
of authority by agent, 518.

WEIGHTS AND MEASURES,

sales without use of approved weights or measures, 263.

WILLS,

as memorandum required by statute of frauds, 83.

WITNESSES,

agreements tending to induce perjury, 292.

WRITTEN CONTRACTS,

see "Frauds, Statute of."
necessity for writing, 62-105.
deeds, 51.
negotiable instruments, 63.
assignment of patent or copyright, 64.
acceptance of bill of exchange or order, 63.
insurance, 63.
acknowledgment of barred debt, 63.
new promise by infant, 63.
conveyances of land, 64.
waiver, statute of frauds, 65.

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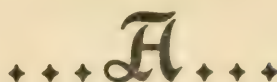
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TABLE OF CONTENTS.

Chapter I. WHAT IS REAL PROPERTY: Real and personal property, fixtures, equitable conversion, personal interests in land.	Chapter X. EQUITABLE ESTATES: Statute of uses, classification of trusts,—express, implied, resulting, constructive,—incidents of equitable estates, charitable trusts.
Chapter II. TENURE AND SEISIN.	Chapter XI. ESTATES AS TO TIME OF ENJOYMENT —FUTURE ESTATES: Reversions, possibilities of reverter, remainders, rule in Shelley's Case, future uses, springing uses, shifting uses, executory devises, incidents of future estates.
Chapter III. ESTATES AS TO QUANTITY—FEE SIMPLE: Classification of estates, freehold, fee-simple, creation, right of user and alienation.	Chapter XII. ESTATES AS TO NUMBER OF OWNERS —JOINT ESTATES: Joint tenancies, tenancies in common, estates in coparcenary, estates in entirety, estates in partnership, incidents of joint estates, partition.
Chapter IV. ESTATES AS TO QUANTITY (Continued)—ESTATES TAIL: Classes, origin, creation, incidents, duration, tenant in tail after possibility of issue extinct, estates tail in the United States, quasi entail.	Chapter XIII. INCORPOREAL HEREDITAMENTS: Easements, creation, classification, incidents, destruction, rights of way, highways, light and air, lateral and subjacent support, party walls, easements in water, profits a prendre, rents, franchises.
Chapter V. ESTATES AS TO QUANTITY (Continued)—CONVENTIONAL LIFE ESTATES: Life estates, creation, conventional life estates, incidents, estates per autre vie.	Chapter XIV. LEGAL CAPACITY TO HOLD AND CONVEY REALTY: Infants, persons of unsound mind, married women, aliens, corporations.
Chapter VI. ESTATES AS TO QUANTITY (Continued)—LEGAL LIFE ESTATES: Estate during coverture, curtesy, dower, homestead, federal homestead act.	Chapter XV. RESTRAINTS ON ALIENATION: Restraints imposed by law, restraints in favor of creditors, restraints imposed in creation of estate.
Chapter VII. ESTATES AS TO QUANTITY (Continued)—LESS THAN FREEHOLD: Estates for years, letting land on shares, tenancies at will, tenancies from year to year, letting of lodgings, tenancies at sufferance, licenses.	Chapter XVI. TITLE: Acquisition of title by state and private persons, grant from state, conveyances, common-law conveyances, conveyances under statute of uses, modern statutory conveyances, registered titles, requisites of deeds; covenants for title, seisin, against incumbrances, warranty, further assurance; estoppel, adverse possession, accretion, devise, descent, judicial process; conveyances under licenses, under duress; tax titles, eminent domain.
Chapter VIII. ESTATES AS TO QUALITY ON CONDITION—ON LIMITATION: Estates on condition, estates on limitation, base fees.	
Chapter IX. ESTATES AS TO QUALITY (Continued)—MORTGAGES: Parties, nature, form, rights and liabilities of mortgagor and mortgagee, assignment of the equity of redemption, assignment of the mortgage, priority of mortgages and other conveyances, registration, discharge of a mortgage.	

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TABLE OF CONTENTS.

PART I.

HUSBAND AND WIFE.

Chapter I.

MARRIAGE: Covering definition and essentials; capacity of parties; reality of consent; formalities in celebration; annulment and avoidance; validating acts; conflict of laws, etc.

Chapter II.

PERSONS OF THE SPOUSES AS AFFECTED BY COVERTURE: Covering rights inter se; crimes and torts of married women; crimes and torts as between husband and wife; torts against married women; actions for alienation of affections; crim. con., etc.

Chapter III.

RIGHTS IN PROPERTY AS AFFECTED BY COVERTURE: Covering wife's earnings; wife's choses in action and in possession; wife's chattels real; administration of wife's estate; equitable and statutory separate estate; community property; curtesy; dower; estates by the entirety, etc.

Chapter IV.

CONTRACTS, CONVEYANCES, ETC., AND QUASI-CONTRACTUAL OBLIGATIONS: Covering, inter alia, husband's liability for wife's necessities, antenuptial debts, and funeral expenses; wife as a sole trader; wife as husband's agent; conveyances, sales, and gifts by the wife, etc.

Chapter V.

WIFE'S EQUITABLE AND STATUTORY SEPARATE ESTATE: Covering their nature; jus disponendi; power to charge by contract, etc.

Chapter VI.

ANTENUPTIAL AND POSTNUPTIAL SETTLEMENTS: Covering the subject generally, including marriage as a consideration; the statute of frauds; validity against creditors and purchasers, etc.

Chapter VII.

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PART II.

PARENT AND CHILD.

Chapter VIII.

LEGITIMACY, ILLEGITIMACY, AND ADOPTION: Covering legitimacy of children; adoption of children; status of illegitimate children.

Chapter IX.

DUTIES AND LIABILITIES OF PARENTS: Maintenance, protection, and education of child; allowance out of child's estate; child as parent's agent; parent's liability for crimes and torts of child, etc.

Chapter X.

RIGHTS OF PARENTS AND OF CHILDREN: Right to custody; service and earnings of child; correction of child; emancipation of children; action by parent for injuries to child; gifts, contracts, and conveyances between; advancements; duty to support parent; domicile of child, etc.

PART III.

GUARDIAN AND WARD.

Chapter XI.

GUARDIANS DEFINED — SELECTION AND APPOINTMENT: Covering natural guardians; testamentary guardians; statutory guardians; guardians by estoppel; guardians of insane persons; guardians ad litem, etc.

Chapter XII.

RIGHTS, DUTIES, AND LIABILITIES OF GUARDIANS: Right to custody and services of ward; maintenance of ward; change of ward's domicile; management of ward's estate; foreign guardians; inventory and accounts; compensation of guardian; transactions between guardian and ward, etc.

Chapter XIII.

TERMINATION OF GUARDIANSHIP — ENFORCING GUARDIAN'S LIABILITY: Covering the subject generally.

PART IV.

INFANTS, PERSONS NON COMPOTES MENTIS, AND ALIENS.

Chapter XIV.

INFANTS: Covering contracts of infants, including ratification and disaffirmance; liabilities for necessities, etc.; capacity to hold office, to make a will, and as witnesses; liability for torts and crimes; infants as parties to actions, etc.

Chapter XV.

PERSONS NON COMPOTES MENTIS AND ALIENS: Covering insane and drunken persons, their contracts, their liability for torts and crimes and testamentary capacity, etc.

PART V.

MASTER AND SERVANT.

Chapter XVI.

CREATION AND TERMINATION OF RELATION: Remedies for breach of contract; rights and duties and liabilities inter se and as to third persons, etc.

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TABLE OF CONTENTS.

Part I.—DEFINITIONS AND DIVISION OF SUBJECT.

Chapter I.

DEFINITIONS AND DIVISION OF SUBJECT: Executors and administrators defined; analysis of book.

Part II.—APPOINTMENT AND QUALIFICATIONS.

Chapter II.

APPOINTMENT IN COURT: Necessity of administration; necessity of appointment by court; jurisdiction; conclusiveness of decrees of probate courts, etc.

Chapter III.

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Chapter IV.

WHO MAY CLAIM APPOINTMENT AS EXECUTOR: Designation in will; appointment by delegation; executor of executor; non-assignability of office.

Chapter V.

WHO MAY CLAIM THE RIGHT TO ADMINISTER: Principle which governs the right; order of precedence; creditors; preferences among kindred, etc.

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DISQUALIFICATIONS FOR THE OFFICE OF EXECUTOR OR ADMINISTRATOR: Infants, married women, idiots, lunatics, convicts, corporations; poverty and insolvency; absolute and discretionary incompetency, etc.

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PROCEEDINGS FOR APPOINTMENT OF EXECUTORS AND ADMINISTRATORS: In general.

Chapter IX.

SPECIAL KINDS OF ADMINISTRATIONS: Administration cum testamento annexo; de bonis non; during minority; pendente lite; public administrator; executor de son tort, etc.

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JOINT EXECUTORS AND ADMINISTRATORS: Nature of estate; rights, powers and liabilities; remedies between, etc.

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ADMINISTRATION BONDS: Covering the subject generally.

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Chapter XIX.

DISTRIBUTION OF TESTATE ESTATES: Order, time and mode of distribution; rights of husband, widow and next of kin, right of presentation, payment of distributive share, etc.

Chapter XX.

ADMINISTRATION ACCOUNTS: Time and manner of accounting, charges and allowances in account; commissions and compensation, etc.

Part IV.—TERMINATION OF OFFICE.

Chapter XXI.

REVOCATION OF LETTERS—REMOVAL—RESIGNATION: Covering the subject generally.

Part V.—REMEDIES.

Chapter XXII.

ACTIONS BY EXECUTORS AND ADMINISTRATORS: Power to sue before probate or grant of letters; survival of actions; actions in personal and representative capacity, etc.

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TABLE OF CONTENTS.

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Chapter VII.

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Chapter VIII.

THE CORPORATION AND THE STATE: Charter as a contract; police power of the state; power of eminent domain; repeal and amendment of charter; taxation of corporation.

Chapter IX.

DISSOLUTION OF CORPORATIONS: How effected; equity jurisdiction; effect of dissolution, etc.

Chapter X.

MEMBERSHIP IN CORPORATIONS: Capital stock and capital; nature of corporate shares; certificates of stock; subscriptions to stock; release and discharge of subscriber, etc., covering the subject generally.

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Chapter II.

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CHAPTER III.

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CHAPTER IV.

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PRESUMPTIONS: Presumptions as rules of law; prima facie, conclusive, spurious, and conflicting presumptions.

CHAPTER VI.

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CHAPTER VIII.

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Chapter II.

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Chap.

- I. Introductory—Definitions.
- II. Creation of the Relation of Principal and Agent—Appointment.
- III. Same (continued)—Ratification.
- IV. What Acts Can be Done by Agent—Illegality—Capacity of Parties—
Joint Principals and Agents.
- V. Delegation by Agent—Subagents.
- VI. Termination of the Relation.
- VII. Construction of Authority.

Part II. RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND THIRD PERSON.

- VIII. Liability of Principal to Third Person—Contract.
- IX. Same (continued).
- X. Admissions by Agent—Notice to Agent.
- XI. Liability of Principal to Third Person—Torts and Crimes.
- XII. Liability of Third Person to Principal.

Part III. RIGHTS AND LIABILITIES BETWEEN AGENT AND THIRD PER- SON.

- XIII. Liability of Agent to Third Person (including parties to contracts).
- XIV. Liability of Third Person to Agent.

Part IV. RIGHTS AND LIABILITIES BETWEEN PRINCIPAL AND AGENT.

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- XVI. Duties of Principal to Agent.
- Appendix.

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9. Revocation and Republication of Wills.
10. Conflict of Laws.
11. Probate of Wills.
12. Actions for the Construction of Wills.
13. Construction of Wills—Controlling Principles.
14. Construction—Description of Subject-Matter.
15. Construction—Description of Beneficiary.
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17. Construction—Vested and Contingent Interests—Remainders—Executory Devises.
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19. Construction—Testamentary Trusts and Powers.
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21. Legacies Charged upon Land or Other Property.
22. Payment of the Testator's Debts.
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TABLE OF CONTENTS.

- | | |
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